The Christian Scholar

VOLUME XL NUMBER 3 SEPTEMBER 1957

TABLE OF CONTENTS

THE CHRISTIAN SCHOLAR

Quarterly Publication of the

Commission on Christian Higher Education

National Council of Churches of Christ in the U.S.A.

257 Fourth Avenue, New York 10, New York

The purpose of the Commission on Christian Higher Education is to develop basic philosophy and requisite programs within its assigned field; to awaken the entire public to the conviction that religion is essential to a complete education and that education is necessary in the achievement of progress; to foster a vital Christian life in college and university communities of the United States of America; to strengthen the Christian college, to promote religious instruction therein, and to emphasize the permanent necessity of higher education under distinctly Christian auspices.

The Christian Scholar is published in March, June, September and December. It is printed by Somerset Press, Inc., 36 East Main Street, Somerville, New Jersey. Cover is printed by Ram Press. the cover artist is Gregor Thompson Goethals; the type is American Uncial designed by Victor Hammer.

Second-class mail privileges authorized at Somerville, New Jersey.

Subscription rates are as follows: $4.00 for one year; $7.00 for two years; $9.00 for three years; $1.25 for all single copies; student rate is $3.00 for one year; $5.00 for two years; foreign rate is $4.50 for one year. $7.75 for two years; $10.00 for three years; 20% discount for bulk orders of ten or more copies to a single address. All manuscripts, books for review and correspondence concerning subscriptions, reprints, advertisements, etc. should be addressed to Wesley M. Stevens, *The Christian Scholar*, 257 Fourth Avenue, New York 10, New York. All unsolicited manuscripts should be accompanied by return postage. Unsolicited review books will not be returned unless by previous arrangement.

Present and future volumes of *The Christian Scholar* will be available to subscribers (only) in microfilm form through University Microfilms, 313 North First Street, Ann Arbor, Michigan.

The Editor's Preface

Professor Wilbur G. Katz generously agreed to prepare an introductory essay for this issue of *The Christian Scholar,* hence this preface can be limited to certain technical information about how this number was prepared and the context in which it is set. The subject of "Christian Faith and Human Law" commends itself for careful study by every thoughtful reader in the academic communities and in the churches. As the essays which follow make clear, the relationship between theology and law has a rich and complex history. And the role of the legal profession both in the universities and in all areas of our common life is significant and comprehensive. Thus we are proud that these essays can be presented in this issue of the journal.

First drafts of several of the essays were initially prepared for a consultation on Christian faith and the legal profession at Lasell House in Whitinsville, Massachusetts in April of this year, which was called by the United Student Christian Council and the Faculty Christian Fellowship. Host to the twenty-five members of the consultation which included law faculty and students, attorneys at law, clergy, and theological faculty was The Right Reverend William Appleton Lawrence, Bishop of the Diocese of Western Massachusetts, Protestant Episcopal Church, who believes that the Church needs to listen to its laity in the professions as they explore the nature of their witness in daily life. Eastern Orthodox, Roman Catholic and Protestant Christians participated.

During 1957-58 visits to thirty centers of legal studies and practice in the United States will be undertaken by Mr. William Stringfellow to extend the conversations already taking place around this subject. These visits will be under the auspices of the U.S.C.C. and the F.C.F. with the aid of the Church Society for College Work. This issue of *The Christian Scholar* will be used in connection with these visits.

Though of independent significance, the consultation and visits to law schools are preparatory to a national conference on Christianity and law to be held in September, 1958, for law students and faculty, practicing lawyers, members of the judiciary, and theologians, all carefully selected to achieve balance among church traditions, legal specializations, geographical locations, and other differentials. This should widen the scope and also deepen the conversation at two central points — points which are brought into focus by the essays in this issue of *The Christian Scholar* — the relationships between jurisprudence and Christian theology and the Christian lawyer in his witness through his daily work.

Our appreciation is expressed to all those who have contributed to this issue, especially to the five authors, but also to the Rev. Richard L. Heaton of the Commission on Higher Education of the National Council of Churches, who has provided staff leadership for this special project, an educational and conference program among Christian laymen in the legal profession. We commend this issue to our readers as additional participants in this significant program.

Law, Christianity, and the University

WILBER G. KATZ

I

Demand for exploration of the relations between Christianity and law comes both from theologians and from members of the legal profession—practicing lawyers, judges, legislators, and scholars. Among theologians, the demand reflects the concern of the Church for man's work and the desire to relate Christian teaching to the problems of the various professions. Among lawyers, the demand reflects dissatisfaction with purely secular analyses of the functions and problems of the law and hope for profounder understanding in the light of Christian doctrine.

Within the university, this effort is not merely the concern of the schools of law and theology. One of the purposes of this introduction is to suggest the importance of these efforts for the university as a whole. The effort to relate law and Christianity touches problems dealt with in many departments of the university and may help to draw them together by contributing to a general understanding of the nature of man.

This enterprise of exploration has proved both difficult and hazardous. For the Church, it is a test of the practical relevance of its teaching in an important area of life. For the lawyer who is also a churchman, it is an effort to achieve integrity, to avoid a devitalizing split between his personal and his professional life. Considering what is at stake, slowness of progress is to be expected. Laymen should not be surprised at the theologians' prolonged and heated controversies. And theologians should understand the fears which often lie behind the hesitancy of even concerned lawyer-churchmen. Participants in the joint enterprise have a sense of its importance and of its risks which is perhaps deeper than that of which they are conscious.

What is it that the Christian lawyer asks of the theologian? He is seeking primarily for help in dealing articulately with a widely held legal-ethical philosophy which he senses is inconsistent with Christianity. This is the philosophy of legal positivism (which attempts to insulate law from morals) and ethical relativism (which reduces morals to a matter of personal opinion and cultural history). The lawyer Christian rejects this position; he knows that law is not merely a means by which the powerful impose their wills upon the remainder of the community. He insists that criticism of rules of law is not merely expression of subjective preference. He denies that his professional work is only a means of earning a living by promoting the interests of the clients who pay his fees.

Dr. Wilber G. Katz is a Professor of Law at the University of Chicago Law School. Much of the renewed concern of laymen for the significance of Christian vocation rests upon the work of Dr. Katz in law and a few other men in their professions who almost alone for many years have articulated the vital relation of Christian faith to daily work.

But the Christian lawyer runs into difficulty when he looks for satisfactory terms in which to declare his belief in the moral foundations of the law, when he seeks for the meaning of objectivity in legal criticism and for criteria in terms of which law may be criticized. He knows that many of his fellow lawyers seek answers to these questions in non-religious terms. Perhaps inconsistently, he wishes both to find common ground with them and also to avoid insulating his professional life from his religious beliefs.

II

This introductory article is not the place for an attempt to summarize the Christian tradition concerning law, however briefly or tentatively. I shall refer, however, to a few of the main points, in order to indicate how they are of interest to scholars in many of the academic disciplines.

1. Man needs the law because he is involved in sin. Man's rebellious rejection of the limited, dependent role for which he was created makes him subject to pride and fear and all but destroys his capacity for loving relationships. Men mutually exacerbate each other's tendencies to aggression, and in family relations infected by sin these tendencies are transmitted from generation to generation. All men share this "fallen" condition, and without law to put bounds to human aggressiveness human society would be impossible.

This sober, realistic view of everyman's need for law backed up by threats of force invites comparison with the view shared by schools of depth psychology. In the words of Dr. Gregory Zilboorg: "We, so-called normal people, know without knowing it, feel without being aware of it, the degree to which we are inwardly tempted in all directions of aggression and depravity. As Freud put it so tartly, the law does not forbid that which man is not prone to do. Therefore, 'Thou shalt not kill' or 'Thou shalt not covet thy neighbor's wife' are not merely prohibitions against the deeds of some few . . . evil men. On the contrary, these are commandments issued for the guidance of the average man with average propensities."[1]

2. Law is part of God's strategy of judgment and mercy for the redemption of sinful man. Judgment must be passed in order that the offender may be called to repentance, and penalty must be imposed in order that deterrent examples may prevent violence and chaos. Punishment is thus God's "strange work," performed in order to make a place for His proper work of redemptive love. God's judgment is linked with the mercy in which He offers a covenant establishing rights for man and conditions for his survival and protection.

God's purpose for the law is fulfilled only when it ceases to be a law vindicated by punishment or obeyed out of fear and becomes a law written in men's hearts.

---

[1] *The Psychology of the Criminal Act and Punishment.* New York, Harcourt, Brace and Company, 1954, pp. 78-79.

This consummation, however, the law is impotent to bring about. Law can summon to repentence but only the grace of forgiving love can enable a man to face the depths of his sin and abandon all attempts at self-justification. This relationship of grace and law is part of the prophetic tradition and is fully revealed in the person of Jesus Christ. Sin is conquered because of God's atoning sacrifice; God's justice is substitutive justice. God enables man to accept forgiveness by His sharing vicariously in the consequences of sin. Law is fulfilled as God lives His atoning life in the wills of sinful men.

This view touches the central problem perennially faced by penology, the conflict between deterrence and rehabilitation as purposes of the criminal law. How can the force and threats necessary to accomplish the first be made compatible with the understanding and forgiveness required for the latter? Nor is this a problem only for students of delinquency. Parallel problems arise in the study of child development, for character apparently matures through alternating experiences of "law" and "grace."

3. These points imply a unique concept of responsibility. Christian thought affirms both the reality of free will and the pervasiveness of psychological and social determinants of conduct. Man is responsible before God only for the exercise of his freedom; he is guilty only for acts which involve turning away from grace known to be available to him. This is in sharp contrast with the broad concept of legal responsibility. Before the law, sane men are responsible for their acts regardless of the extent and character of determining influences. They are treated as if they had unlimited freedom of choice. Legal responsibility is imposed notwithstanding the fact that it is to a large extent vicarious responsibility for the acts of others.

For Christian thought this aspect of legal responsibility is no stumbling block. The law declares unqualified individual responsibility and man's duty to accept it. Christianity asserts that man has both freedom and the power to accept responsibility when gracious help is mediated to him.

In an intricate pattern men are thus bound together in sin and in the processes of redemption: When we offend, it is partly because of the acts of others which condition our conduct; when we obey the law, it is partly because offenders are punished to furnish examples; when we accept responsibility for our acts, we accept responsibility also for those who helped make us what we are; when we take this painful step, it is only as we see forgiveness manifested in the willingness of others to share in the pain.

Expository statements always fall short of expressing this mutual involvement of human beings. Creative artists, however, have given it concrete and powerful embodiment. Dostoyevsky's *Crime and Punishment*, T. S. Eliot's *The Family*

Reunion, William Faulkner's *Requiem for a Nun*, and Robert Warren's *Brother to Dragons* are titles which come to mind. Students of literature and of law have complementary concern with the Christian concept of responsibility.

4. Christian tradition has made in widely varying forms the assertion that law has a central core which is of divine origin. The way in which this core is conceived has varied with the relative emphasis placed on different elements in the Christian tradition. Thus varying emphasis on man's sin is one source of divergence in the Christian legal tradition.

Scholastic natural law doctrine reflects relatively little emphasis on sin. Natural law is conceived as man's rational participation in the eternal law which is the rational pattern of the divine creation. Natural law principles and precepts are thus referable to man's "original" nature; they constitute the general pattern which would characterize the relationships of men living rationally in accordance with this nature. Sin features only as man's departure from his true nature and as the reason why coercive sanctions are necessary.

In other threads of the Christian tradition concerning law, the principal emphasis is on man's sin. Law is conceived as an instrument of God's redemptive activity. When the term "natural law" is used in this context, the reference is usually to man's "fallen" nature and to the basic legal institutions necessary for social life under conditions of sin. These include institutions through which men may deal with each other impersonally and thus economize their limited capacity for conciliation and agreement.

Conceptions of natural law are a traditional concern of political philosophy, and the Christian conceptions invite comparison with those which developed in Greek thought and in the period of the Enlightenment. Natural law also poses a problem which empirical sociology and anthropology have not been quite able to avoid. In the words of a sociologist-theologian, "Are there in fact any universal conditions of social health and stability, the reality of which can be shown by a comparative survey of human cultures and societies?"[2]

Another source of diversity in Christian theories of law has been the variation in emphasis upon love as an ethical requirement. In scholastic ethics, love is no more a central concept than it is in the ethics of Aristotle. In Protestant ethical thought, on the other hand, love usually has this central position. Secular ethical theories have illustrated a similar divergence. In this connection it is interesting to note the importance of love in modern psychology and in ethical theories based upon psychological analysis; e.g., Erich Fromm's *Man for Himself*.

5. These differences are paralleled by differences in the way Christian writers have viewed the process of ethical decision and of legal criticism. For those in the

[2] J. V. Langmead Casserley, *Morals and Man in the Social Sciences*. London, Longmans, Green and Co., 1951, p. 60.

scholastic tradition, the process is one of rational application to changing circumstances of the hierarchy of principles and precepts which constitute the natural law. Others emphasize the wide area of indeterminacy and the necessity of free decision in faith. The process is sometimes described in terms of creative imagination or of personal encounter of those with conflicting claims. For example, according to Paul Tillich, love is the dynamic of creative justice; love, in its functions of "listening, giving, forgiving . . . recognizes what justice demands."[3]

In the study of government, some have seen in the process of policy formation only a struggle of power with power. Those who reject this view formulate in varying ways the process by which justice is promoted in a democratic community. Students of political thought may find it rewarding to compare these formulations with the diverse threads in the Christian tradition concerning the struggle for justice.

III

As already indicated, the Christian legal tradition is ambivalent with respect to human reason. One branch is relatively optimistic as to the possibility of a rational ethics relevant to legal criticism. It is a living part of the tradition despite repeated warnings against pretentious rationalism. Such warnings come from those who emphasize the corruption of reason by sin, and they in turn are warned of the dangers of abdication of ethical judgment with resulting uncritical acceptance of existing laws or uncritical romanticism in legal reform.

Christian teaching on law is thus a great dialectic, and the present symposium illustrates this characteristic. I have suggested that the lawyer who seeks to relate Christianity and law is seeking for a Christian philosophy of law or for a Christian basis for discriminating among philosophies of law. He is seeking also for Christian ethical standards for criticising particular laws or for Christian understanding of the process of criticism. But the symposium reveals disagreement as to the propriety of such a search. Professor Stumpf considers such questions appropriate and indicates some of the answers in the Christian tradition. Mr. Stringfellow, however, denies the possibility of a Christian philosophy of law. He denies that Christianity provides ethical norms and asserts that the gospel stands in opposition to laws both good and bad. For him Christianity offers not standards for rational criticism but a vocation to worship and witness which may be lived within the calling of the law.

In the entire symposium, *The Christian Scholar* carries on the historic dialectic and calls for wider participation in the continuing enterprise.

---

[3] *Love, Power, and Justice.* New York, Oxford University Press, 1954, p. 84.

Theology and Jurisprudence

SAMUEL ENOCH STUMPF

Our era is one in which the law plays a far more important role than at any other time in history, for the law has insinuated itself into the control of almost every facet of man's life. If it was true over a century ago, as Chief Justice Marshall said, that "the judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all,"[1] it is even more true today as the law has continued to proliferate its influence over an ever-widening range of human conduct. But it is precisely because the law has become such a dominant factor in life that profound questions about its nature have arisen for which the everyday conceptions of law do not provide us with adequate answers.

The dramatic events of recent history which have focused attention again upon the question of law, particularly the rise of totalitarianism, reveal not only the decisive effect of the regime of law upon human life and destiny but also the impotence of contemporary legal theory to cope with the "lawlessness" of law. Even in calmer days, Holmes argued that "theory is the most important part of the dogma of the law,"[2] a view grimly corroborated by one of the great legal minds of modern times, Gustav Radbruch, who, looking back upon the debacle of his country wrote that "The inherited conception of law, the legal positivism that ruled unchallenged among German legal scholars for decades and taught that 'law is law'—this view was helpless when confronted with lawlessness in a statutory form. For the adherents of this view any statute however unjust had to be treated as law."[3] In the very same essay in which he extolled the need for legal theory, Holmes gave a definition of law that bears all the fatal infirmities Radbruch saw in German legal positivism, for Holmes' realistic conception of law, defined as "the prophecies of what the courts will do in fact, and nothing more pretentious,"[4] is just as incapable of discriminating between the "just" and "unjust" law. Lurking behind Holmes' definition of law as simply a "prophecy of what the courts will do" was a portentous theoretical premise, namely, that a legal theory is not obliged to provide any basis for determining the "justice" or the "injustice" of a law. This premise has become so fundamental in modern jurisprudence that Hans Kelsen, the most influential legal theorist of our day, argues in his major treatise that "the concept of law has no moral connotations whatsoever."[5]

Dr. Samuel Enoch Stumpf is chairman of the Department of Philosophy and Lecturer in Jurisprudence in the Law School, Vanderbilt University.

[1] Chief Justice John Marshall, in the course of the debates of the Virginia State Convention of 1829-30, cited by Justice Sutherland in *O'Donoghue v. United States*, 289 U.S. 516, 532.

[2] 10 *Harvard Law Review*, 457, 458.

[3] Gustave Radbruch, "Die Erneuerung des Rechts in 2 Die Wandlung 9. cited by Fuller in "American Legal Philosophy," 6 *Journal of Legal Education*, No. 4, 483-84.

[4] Holmes, 10 *Harvard Law Review*, 457, 478.

[5] Hans Kelsen, *The General Theory of Law and State*, (tr. by A. Wedberg), Cambridge, Harvard University Press, 1945, p. 5.

The separation of law from moral and religious elements has been considered by many a great triumph of the modern scientific intellect. In this vein, Sir Henry Maine wrote that "the severance of law from morality, and of religion from law, [belongs] . . . very distinctly to the later stages of mental progress."[6] Even more explicitly, John Chipman Gray argued that "the gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of the state or other organized body is not an ideal; but something which actually exists. It is not that which is in accordance with religion or nature, or morality; it is not that which ought to be but that which is."[7] The truth of these statements lies in the fact that there is a difference between a legal order, a system of morality, and a set of religious beliefs. But it does not follow from any kind of logic that the legal order does not contain elements of moral and religious beliefs. Indeed, it is because modern positivistic jurisprudence has defined law as having "no moral connotation whatsoever" that it has obscured the very meaning of law. To be sure, the object behind the formulation of the "pure" theory of law is to rid the definition of law of political and subjective ideological ingredients. That ideology moves into the content of law cannot be questioned. For example, Professor Panunzio declared in his inaugural lecture that "we must 'Fascize' the instruction of law . . . Instruction in the theory of law is like instruction in religion."[8] And even the Marxists, whose chief criticism of bourgeois law is that it is simply the instrument of ideology, have begun to reconstruct law along ideological lines: "The Soviet Courts" writes Gintsburg, "were designed to render specific 'class justice' . . . [they] are called upon to carry out the policy of the soviet government and communist party as well as the Marx-Lenin Doctrine."[9] Recognizing that a system of law can embody ideology in its most pathological form, does it follow that legal theory must isolate the phenomenon of law absolutely from moral and religious elements? Is it even theoretically possible to define law without taking into consideration its moral and theological aspects? It is important for scientific reasons to be able to distinguish law from other modes by which human conduct is controlled; still, the jurist's chief concern should not be the preservation of certain "scientific" presuppositions but rather a faithful analysis of the total phenomenon of law. If it is a presupposition of the science of law that only what can be physically

---

[6] Sir Henry James Sumner Maine, *Ancient Law*, (1st American edition—from 2nd London edition), New York, Scribners, 1864, p. 16.

[7] John Chipman Gray, *The Nature and the Sources of the Law*, (2nd edition), New York, Macmillan, 1921, p. 94. Cf. Brecht, "The Myth of *Is* and *Ought*," 54 *Harvard Law Review*, p. 11.

[8] In H. Arthur Steiner, "The Fascist Conception of Law," *36 Columbia Law Review*, No. 8, 1271.

[9] Cf. Vladimir Gsovski, "The Soviet Concept of Law," 8 *Fordham Law Review*, 12.

observed[10] will have a rightful place in constructing a theory of law, then obviously there will be no place in legal theory for the concept of justice. But this does not prove that justice is not an essential element of law; it proves merely that legal science has no way of handling the question of justice — that is, that the science of law is incapable of dealing with the total phenomenon of law. On principle, the science of law is forced to distort the meaning of law because it does not ask "What is the full nature of law?" but asks instead, "With what aspects of the phenomenon of law can scientific method deal?" In this case, the scientific method is like a net which catches only some fish while the rest escape. That the ideological content of law may be "subjective" or "relative" and on that account unacceptable to everyone, particularly to the jurist or theologian, does not alter the fact that there can be no law at all without the presence of "value content." An adequate theory of law must be broad enough to deal with all the facts relating to the phenomenon of law including the fact of value. And it is precisely because it seeks to broaden the context within which law is to be studied that theology is so urgently concerned with jurisprudence.

The questions raised by theology strike at the most significant problems of jurisprudence. To formulate these problems and to indicate the intimate relation between theology and jurisprudence we need to employ some minimal definition of law. Let us assume that by the term law we mean at least that

> *Law is i) a consciously formulated norm of behavior, ii), enforced by the power of the state, and, iii) directed toward achieving certain ends.*

This definition raises the three fundamental problems of jurisprudence corresponding to the three parts of the definition. To say, in the first place, that law is a consciously formulated norm of behaviour means that there is no law until some idea prescribing a specific mode of human behaviour is articulated. The critical problem arises when the question is asked, Where did this idea or norm of human behaviour come from? Which also involves the question, What are the grounds for the "validity" of the idea which is articulated in the form of a command? That is, is law in its first aspect a matter of arbitrary government command, or is it a product of custom, or is it derived from nature, or is it in some way derived from God? These questions provoke the first problem which has to do with the *Source of Law*. In the second place, to say that law is a norm enforced by the state raises the crucial question concerning the role of force in the phenomenon of law. Although law does not exist apart from the element of force, does this mean that the essential element or the essence of law (Holmes' *ultima ratio)* is force? In a fundamental

[10] E.g., Kelsen argues that the "theory of the priority [i.e. *prior to positive law*] of rights is untenable from a logical point of view. . . . The fact that an individual has a right or has no right to possess a thing cannot be seen or heard or touched. . . . There can be no legal rights before there is law." *op. cit.* p. 79, italics added.

way this part of our definition raises the second problem, namely, What is the *Nature of Law*? In the third place to say that law is directed toward achieving certain ends is to say that law is inevitably involved in deliberating over, choosing, and supporting certain values. The broad question raised here is, What is the purposive *End of Law?* Thus the theologian in jurisprudence is concerned with the problems of the source, nature, and end of law.

I. *The Source of Law*

Every legal theory is constructed upon some conception of the source of law. It would appear that the question about the source of law is quite academic since everybody knows that its source is either the legislator or the official ruler. But it turns out that this question is fundamental because it is another way of asking also What is the validity of the law? Here again, it might be argued that there is only one kind of valid law in the strict sense of the word, and that is the law which is officially and properly enacted. Yet it is precisely the official law which can raise the most fundamental problems for man. Sir Edward Coke in Dr. Bonham's case[11] was dealing with an official act of Parliament when he argued that a law which is contrary to common right or reason is void, an argument used centuries earlier by Plato when he said that "no law or ordinance whatever has the right to sovereignty over true knowledge."[12] More recently Justice Cardozo made the same point when he wrote that "What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform,"[13] thus suggesting that there is a source of law prior even to the legislator or judge. This brings us directly to the central issue in jurisprudence, which is whether law is to be understood solely in its positive terms or whether the whole legal system must be viewed from some critical perspective. While theology has not spoken and today does not speak with a clear and decisive voice on this problem, it does provide a perspective for jurisprudence because of what it has to say about both legal positivism and the doctrine of natural law.

Positivism

The major theologians accepted certain aspects of legal positivism even though none of them absolutely repudiated the doctrine of natural law. Where they differed was in the degree to which they would invoke the natural law against the existing

---

[11] Cf. T. F. T. Plucknett, "Bonham's Case and Judicial Review," 40 *Harvard Law Review*, 34.

[12] Also, for Plato every law had to have two parts, the substantive part and the preamble, where the preamble was to provide the rational and moral justification of the substance. Cf. Plato's *Laws*, 722 D—723 B (Jowett Ed. 1892) and Calhoun, *Introduction to Greek Legal Science*, Oxford, The Clarendon Press, 1944, pp. 82-83.

[13] Benjamin N. Cardozo, *The Growth of the Law*, New Haven, Yale University Press, 1924, p. 87.

positive law. St. Augustine was led by his realistic interpretation of human nature to see the folly of expecting sinful man to create perfect laws and a perfect society, and Luther appeared to have an almost uncritical acceptance of the state. But there is a direct thread of thought which contains classical and Christian views about man and law running through Augustine, Aquinas, Luther, Calvin and today in Brunner and Niebuhr. In spite of the major differences in these theologians, which we shall indicate later, they stand united against the basic premise of legal positivism.

The groundwork of modern positivistic legal theory was laid by Thomas Hobbes. His notion that "there can be no unjust law" was the logical outcome of his account of the source of law. When he wrote that "laws are the rules of just and unjust; nothing being reputed unjust, that is not contrary to some law,"[14] he made it impossible for any statute to be unjust. The theoretical basis of this notion is that for Hobbes there are no moral principles which precede the law; the creation of law and of morality occur simultaneously. There is no perspective from which to criticize law, for there is no law of nature behind the positive law, only the natural law of preservation. There is in Hobbes' theory, moreover, a pessimistic view of man which is far more uncreative than the theological doctrine of sin, for it considers man so irretrievably selfish and predatory that he must be restrained by the absolute authority of the state. Hobbes' account of the lawlessness of the "state of nature" is the decisive element of his account of the source of law, for by lawlessness in this state he means not only the absence of positive law but the absence of man's awareness of an order of right. Thus, as Hobbes traces back the source of law to its origin, he arbitrarily stops with the fiction of the Social Contract as the starting point of all law. This had the effect of forcing a decisive breach between theology and jurisprudence, for it now made man's experience of grace, his confrontation with God through the historic revelation in Christ, irrelevant for the legal system. When Christians objected that the positive law might force them to compromise their faith, Hobbes made the severe rejoinder that in that case the Christian must "go to Christ in martyrdom."[15] But the rigid positivism of Hobbes prevailed, was later embedded into jurisprudence by Jeremy Bentham and John Austin, and stands today as the most formidable theory of law, finding its most elaborate expression in the work of Hans Kelsen.

Like Hobbes, Kelsen is concerned with providing a theory of the source of law, for in this way he attempts to provide a clearer definition of law. The key to Kelsen's system is the word "normativism."[16] All laws are norms. If what we call a law is not a norm then it is not a law. What then is a norm? A norm is "an *impersonal command*." From whence does this norm come? Every norm derives from another norm. That is to say, the legal system is a hierarchy of norms whose

[14] *Leviathan*, chap. xxvi.

[15] Hobbes, *De Cive*, chap. xviii, 13.

[16] Cf. Hans Kelsen, "Pure Theory of Law," 50 *Law Quarterly Review*, 474.

regress can be traced back finally to the "basic norm," and beyond that there is nothing. The "basic norm" is ultimately the source of all laws; it is the starting point of the norm-creating process. The basic norm is a hypothetical assumption; more specifically, it is the norm which authorizes the historically first legislator. The function of the basic norm is to confer law-creating power upon the first legislator and on all the other acts *based upon the first act.* In Kelsen's theory, everything depends upon this last statement; for, every norm, i.e., every law, is valid only insofar as it is based upon the basic norm, or, subsequently, upon some other norm which issued from the basic norm. The crucial problem then is to designate the character of the basic norm.

Kelsen likens the basic norm to the transcendental logical principles of cognition which are not empirical laws but merely the conditions of all experience. So, too, the basic norm is itself no positive rule because it has been made, but is simply presupposed as the condition of all positive legal norms. The *final* presupposition is not, for example, the first constitution, but the validity of that constitution. The final postulate is that at a given time in history there existed a condition which validated the first constitution — that condition, not itself an act or statute, is the basic norm. Thus, from the basic norm there emerges a valid and authorized constitution. From the constitution there emerge types of law, for example, the civil and criminal law. The criminal law, for example, in turn produces a specific statute; and from that statute specific decisions are arrived at by the court effecting individuals. The sequence here is from norm to norm, from law to law. For the Constitution, criminal law, statute, and decision are each norms, and constitute the hierarchy of norms. The only criterion for the validity of a law is that it must have been produced by some superior law in the legal hierarchy. This does not mean, says Kelsen, that laws are deduced logically from higher norms: rather, just as one cannot know the empirical world from the transcendental logical principles but merely by means of them, so positive law cannot be derived from the basic norm but can merely be understood by it. Fundamentally, this means that norms do not in any way correspond to Reality but derive their ultimate validity simply from proper enactment. Kelsen puts this central point in these words:

> The norms of positive law are valid; that is, they ought to be obeyed, not because they are, like the laws of natural law derived from nature, God, or reason, from a principle of absolutely good, right or just, from an absolutely supreme value or fundamental norm which itself is clothed with the claim of absolute validity, but merely because they have been created in a certain way or made by a certain person. This implies no categorical statement as to the value of the method of law-making or of the person functioning as the positive legal authority; this value is a hypothetical assumption.[17]

> [Also, the basic norm] is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act.[18]

[17] Kelsen, *General Theory of Law and State,* p. 394.
[18] *ibid.,* p. 116.

While theology would grant much of what Kelsen has to say about the source of law, it would point out that his positivism is not based completely upon positivism, and insofar as it is, it supplies us with a grotesque conception of law. It is quite true, as Kelsen argues, that law proliferates within the structural framework of civil government, but this could mean that absolutely any act officially done has the character of "law." Since the lesser norms are not derived by logical consistency from the higher ones, there is no check on the kind of laws passed. The validity of laws rests solely upon their being properly enacted. Yet in actual fact, Kelsen's system rests upon a natural law presupposition, for the basic norm, Kelsen holds, "is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitation."[19] With this admission, it seems that a considerable alteration is made in the force of Kelsen's theory. All that he can now say is that "law is law,"[20] or, once a legal order is legitimized, every law it spawns is valid. But since the system rests upon some natural law-like premise, a principle of validity of a moral nature is already built into the system, however minimal this principle may be. At the same time, Kelsen retains Hobbes' fundamental notion that there is no theoretical relation between morality (or Reality) and law,[21] chiefly because there are no *mala in se*, only *mala prohibita*, since an act is a ***malum*** only because it is *prohibitum*.[22] Thus Kelsen desires not only to distinguish law and morality but to go further and say that while we can know something about law, as he has defined it, we cannot have any knowledge of "good" or "justice." The essence of law then becomes "coercive force"[23] resting upon the community's "monopoly of force." According to this theory any and every actual system of law has the same validity and is in every sense equally law. Thus, the term law is defined exclusively as the command of the sovereign and the scope of jurisprudence is severely limited to law as it is, dismissing the most critical problems of law as matters of politics and ideology.

---

[19] *ibid.*, p. 401.

[20] Pashukanis recounts Offner's critical estimate of Kelsen's theory in the form of a caricature of a jurist addressing the legislator: "What laws you should enact we do not know. Concerning that we are not disturbed—it relates to an art foreign to us; to the art of the legislator. Enact what statutes you wish. Only when you shall have enacted some statute will we explain to you, in Latin, what statute you have enacted." "Theory of Law and Marxism," *Soviet Legal Philosophy*, (trs. by Hugh W. Babb; intro. by John N. Hazard), Cambridge, Harvard University Press, 1951, p. 115.

[21] *General Theory of Law and State*, pp. 5, 114; for an exception to this see p. 131.

[22] *ibid.*, pp. 52, 78-79.

[23] *ibid.*, p. 36.

Natural Law

From the theological point of view, the whole idea of law is incomprehensible apart from a consideration of the status of man in the nature of things. Law is made possible by man's capacity to reflect upon his responsibility to others as well as to himself. That is, man is able to transcend his own and the collective conduct and perceive the difference between the "is" and the "ought" in that conduct. This awareness of "ought" is the primary datum in law regardless of the forms law takes. The usual distinction between positive law and natural law is at this point irrelevant, for the consciousness of "ought" is common to both. It is not possible to conceive of a positive law which does not emerge from a conscious awareness of how somebody ought to behave. The fashioning of this awareness into a statute and its promulgation come later, but there would be nothing to promulgate without this idea of how somebody should behave. This is to say that there could be no law without the consciousness of real alternative ways for men to act. Real freedom must inhere in the nature of man which makes possible the problems which law seeks to correct. At the same time, the ground of law lies in man's awareness of his or his neighbor's deviation from some essential structure of being or mode of conduct to which the law seeks to restore him. At this level, the matrix of law is identical with that of ethics, for the law springs from man's moral constitution.

In pursuing the source of law through the moral consciousness theology seeks to go beyond the usual treatments of legal positivism to some more fundamental source. It is perfectly true that the law as it emerges from his moral consciousness is affected by man's concerns and involvements in his particular society and community, by time and place. That is, custom has a great influence upon the formulation of law as well as ethics. But it is also a fact that custom itself comes under criticism, for man can transcend the current custom by grasping some higher responsibility than the current law may embody. Thus, custom may lie behind positive enactment as a source of law, but it cannot, as Savigny and Puchta thought, be the fundamental source of law.

The essential insight of theology regarding the source of law is that it lies in the very ordering agency of reality. While man possesses vast freedom in conduct, neither his nature nor the nature around him is without some essential form. The ground of man's value and his rights as a person derive from his embodying some mode of purpose. And the coming together of man in society is not a product of man's decision alone but the necessary consequence of his nature. Just why man, whose nature is explained in terms of purpose and a natural need for society, needs law to bind him in brotherhood is seen in theology not only as the consequence of his ignorance but in the peculiar recalcitrance that is made possible by his essential nature, his freedom. The explanation of how man emerges and continues to exist is the clue to the source of law, for man cannot be understood when dis-

engaged from the ground of his being. Every school of theology is at one on this matter though great differences ensue when particular explanations are made.

St. Augustine is the pivotal theologian of law, for he is at once the source of Christian natural law theory as well as the tradition, particularly characteristic of the Reformation and some contemporary theologians, which condemns the presumptuousness of natural law doctrine. That St. Augustine affected such diverse traditions is explained chiefly by the fact that he brought together in a peculiar balance the classical Greek view of natural law and the biblical view of God's grace. Thus St. Augustine posed the problem so urgent for contemporary man, which is to understand the relation between the necessities of contingent history and the life which God's grace raises as a possibility. More specifically, like St. Paul, St. Augustine admitted man's capacity to know what his duty to his fellow man is through natural reason but pointed out that no static rational ethical norm can do justice to the infinite modes in which human beings encounter each other. This meant that Augustine saw the limitations of positive morality and positive law when viewing man in his essential nature, namely, in his capacity to love. But Augustine did not on that account consider law and love as unrelated, as though the spheres of nature and grace bear no relation to each other. The intimate relation between love and law in the human sphere is the consequence of the coalescence of these modes in God. In human history this means that there is a constant tension between the positive law and the demands of love, between jurisprudence and theology. Neither man nor any of his institutions ever overcome the critical force of the judgment of love; but likewise, the redemptive power of love affects not only man but also his institutions. It is quite instructive that while St. Augustine took a very realistic view of the state, it was not the state he had in mind when he spoke of the *civitate terrana*, just as it was not the Church he had in mind when he spoke of the *civitate Dei;* this suggests that since the *civitate Dei* is within society the higher ethic of love can have some bearing even upon the structures of law if those fashioning it love God.

From Augustine, Aquinas lifted chiefly the rational element of law, taking as his starting point Augustine's statement that "that law which is supreme Reason cannot be understood to be otherwise then unchangeable and eternal."[24] From this, Aquinas built a very neat doctrine of the source of law where the human, positive law, if it is valid, comes from the natural law, while the natural law is derived from the eternal law. By eternal law, Aquinas meant God's eternal reason which orders the whole universe. By natural law he meant that part of the eternal law which man's reason can grasp and which pertains to his life and institutions. By human law he meant the positive law which is necessary because man does not automatically behave in such a way as to fulfill his nature. But Aquinas went so far as

[24] Thomas Aquinas, *Summa Theologica*, Q. 91. A. 1.

to say that if the positive law was contrary to the natural law, it did not have to be obeyed, for then it "was not a law, but a perversion of law."

Behind this Thomistic doctrine of natural law lies a very optimistic theory of knowledge which assumes that the human intellect can begin by abstracting the notion of being from objects experienced and arrive at the notion of an ultimate Being. Moreover, through the device of analogy, the intellect can understand the nature of God and can conclude that man and God differ only in that their mode of existence differs. That is, God's essential nature is rational and so is man's, which means that man knows what God knows but not as much since man is finite and contingent. Man's natural reason can "participate" in God's reason, and insofar as God's reason is the eternal law, man has a direct knowledge of that law which in its limited human form is natural law. Thus man possesses the equipment for a natural morality and a natural justice. He is able to perceive the purpose and order in institutions. A careful reading of Aquinas' *Treatise on Law* indicates that he took into consideration the ambiguities of the human mind caused by self-interest and laziness and indicated the role of God's grace in the full understanding of law. Nevertheless, the outcome of this theory of natural law was the constantly treacherous experience of ascribing to contingent cases ultimate and immutable solutions. But this is not an argument against natural law as much as it is a limitation or perversion of it.

Calvin took a fundamentally different view of man's rational capacity, having in mind the more biblical insights of St. Augustine. "Human reason," said Calvin, "neither approaches, nor tends, nor directs its views toward this truth, to understand who is the true God, or in what character he will manifest himself to us."[25] He argued that "the mind of man is so completely alienated from the righteousness of God, that it conceives, desires, and undertakes everything that is impious, perverse, base, impure and flagitous: that his bent is so thoroughly infected by the poison of sin, that it cannot produce anything but what is corrupt. . . . The mind always remains involved in hypocracy and fallacious obliquity."[26] Of the biblical doctrine that God created man in his image, Calvin says that "although we allow that the Divine Image was not utterly annihilated and effaced in him, yet it was so corrupted that whatever remains is but horrible deformity."[27]

Yet, this did not mean that Calvin entirely repudiated the doctrine of natural law. He could write that "We perceive in the minds of all men general impressions of civil probity and order. Hence it is that not a person can be found who does not understand that all associations of men ought to be governed by laws, or who does not conceive in his mind the principles of those laws."[28] What Calvin did was to

[25] John Calvin, *The Institutes of the Christian Religion*, II. 22, 18.
[26] *ibid.*, II. 5, 19.
[27] *ibid.*, I. 15, 4.
[28] *ibid.*, II, 2, 13.

shift the focus from man's reason to his conscience (a somewhat ambiguous move since he speaks of "conscience which has been engraven on the minds of men"). The distinctive view of Calvin here seems to be that natural law is not constructed by human nature expressing itself rationally, but that it is a law imposed from without by God. Hence Calvin says, "our conscience does not permit us to sleep in perpetual insensibility, but is an internal witness and monitor of the duties we owe to God, shows us the difference between good and evil and so accuses us when we deviate from our duty."[29]

The distinction between the Thomistic and Calvinistic theories of natural law is a distinction between two theological interpretations of the source of law. The first is God as Eternal Reason and the other is God as Creative Will. In the first, there is a more static conception of the eternal rational forms which the human reason can grasp in some measure, whereas in the second the dynamic will of God is known through faith. This distinction lies at the difference between contemporary theologians who write about law. Niebuhr does not, in spite of his criticism of it, deny the essental premise of natural law theory, for he does not deny that in the last analysis we look to our understanding of God in order to understand the nature of man. What Niebuhr does say is that we cannot derive a valid natural law which rests solely on the rational capacity of man, even though this human reason talks about God, for the limitations of human reason create limitations of our understanding of God. Nevertheless, Niebuhr does see some essential universal structure in the human moral constitution when he says that "The practical universality of the prohibition of murder, for instance, in the moral codes of mankind is just as significant as the endless relativities which manifest themselves in the practical application of the general prohibition. There are essential universal principles of justice. . . ."[30] Moreover Niebuhr says "it is important to recognize the validity of principles of justice, *rationally conceived,* as sources of criticism for the historical achievements of justice." He considers Karl Barth's notion that without the introduction of the Ten Commandments as guides the moral life of man would possess no valid principles of guidance to be "as absurd as it is unscriptural."[31] Furthermore, Niebuhr's conviction that the positive legal order is always under the judgment of the higher ethics of love as we know it through God's revelation is an additional confirmation of the perspective of natural law. This is to say, the doctrine of natural law is misconceived if it is taken to mean only a system of ideal law which natural reason fabricates. This is true not only because the distinction between reason and revelation is not as simple as it is frequently made out to be,[32]

---

[29] *ibid.*, II, 8, 1.

[30] Reinhold Niebuhr, *The Nature and Destiny of Man,* New York, Scribner's, 1943, vol. II, p. 254.

[31] *ibid.*

[32] Cf. Paul Tillich, *Biblical Religion and the Search for Ultimate Reality,* Chicago, University of Chicago Press, 1955, pp. 1-10.

but because whether the conception of a higher law is based upon reason or revelation, in either case, a perspective has been achieved for understanding the true ground of law. Brunner raises the question "on what . . . is the deviation of the Christian law of nature from the rational Law of Nature based, since both claim to be based upon reason?" And in answer he holds that "in actual fact the so-called law of nature is a concept of the law of nature which has been modified by faith in the Bible, therefore it is not really a law of 'Nature', but of 'creation', and its difference from the law of nature points to the fact that faith and revelation must come to the assistance of reason, in order to discover what is truly rational. The absolute Law of Nature, therefore, is based upon the fiction of a natural reason, which in reality is a reason which is instructed by the Christian belief in God, and by the Christian anthropology which arises from this."[33] But again, for Brunner to shift the source of law from reason to creation does not alter the residual natural law premise in his theology, for to say, as he does, that the ground of law rests ultimately upon God's "allocation" of all elements into essential relationships and that man can know the structure of these relations (whether through reason or revelation) is to affirm that nature embodies, in some form or another, the norms for law. The natural law premise in its simplest form is that man's knowledge of the essential structure of nature yields the norms for law. To view nature from the point of view of God's creative act is nevertheless to have a view of nature, and the notion of law which flows from it is a doctrine of natural law. It is just as risky to think we know the ultimate norm of justice by analysing the created orders as it is to think we can derive them rationally. At the same time, Brunner's emphasis upon the notion that man's nature bears the capacity to be addressed by God in the I-Thou encounter contains a Christian rationalism and the natural law premise. To be sure, Brunner explicitly states that we cannot know "in advance" what is the command of God, but when we do know it, we have something to say about human dignity, rights, freedom, and equality, and we know these, for the most part, dynamically instead of in static form.

It must be acknowledged that between the severe positivist for whom the source of law rests chiefly in proper enactment and the Christian theologian for whom the source of law exists in the creative and redemptive nature of God, there is the possibility of the rational, enlightened, view of law. There can be no quarrel with Pufendorf's notion that even if there were no God there would be a natural law, for this theme of rationalism accords with the theological insight that the human reason is not irrevocably perverse in spite of its constant tendency to divinize historically relative standards. It must always be borne in mind, too, that the

[33] H. Emil Brunner, *The Divine Imperative*, Philadelphia, Westminster Press, 1948, p. 631.

triumph of legal positivism at least to some extent rests upon the nominalism or voluntarism of such theologians as Ockam and Luther. But the theologian would insist that the rationalist is asking man to believe in his interpretation of the source of justice which can be a wide variety of things, such as the moral sentiment, custom, or the economic order. The question of the essence of law is therefore left obscure. While the theologian cannot offer a detailed system of law, he does see the phenomenon of law more creatively because he sees it as related to the essential nature of man and bearing a close relation to God's purpose for man in creation. And to understand the source of law in this way has a great deal to do with how we shall view the nature of law.

II. *The Nature of Law*

Because the law is enforced by the coercive power of the state, it is frequently held that the essence of law is force. The relation of force to law is obscured both in theology and in jurisprudence. For the theologian, this relation is ambiguous because he views the source of law as God who is understood in terms of love, and even though love in this context has no sentimental connotations, its spontaneity seems to be in flat contradiction to force. Some theologians, Barth for example, have therefore concluded that the Christian norm of love cannot provide law with any insight because the law is essentially a regime of force which can bear no creative relation to love. Moreover, the Christian ethic of love is considered by many to be relevant only in personal relations and cannot be translated into a collective standard. In jurisprudence, on the other hand, the necessity of defining the specific nature of law, in order to be clear about the rules of society, leads the jurist to argue that law is essentially those rules which have behind them the force of the state. Thus Kelsen argues that "if we do not conceive of law as coercive order, then we have lost the possibility of differentiation of law from other social phenomena. . . ."[34] This makes force the essence of law, for again, as Kelsen argues, "The statement, a certain social order has the character of law, is a legal order, does not imply the moral judgment that this order is good or just. There are legal orders which are, from certain point of view, unjust. Law and justice are two different concepts."[35] This would mean that Fascist, Nazi, or Communist laws are equally law simply because they possess the essential element of law, namely, force.

When Holmes said that the *"ultima ratio"* of law is force, he had in mind not only the notion that force is the ultimate arbiter between inconsistent views, between dictatorship and democracy, for example. It appears that he also meant that law is by its nature a matter of force, particularly because he was "so skeptical as to

[34] *General Theory of Law and State*, p. 26.

[35] *Ibid.*, p. 5.

our knowledge of the goodness or badness of laws. . . ."[36] Holmes' skepticism led Sir Frederich Pollock to reply that "If you deny that any principles of conduct at all are common to and admitted by all men who try to behave reasonably-well, I don't see how you can have any ethics or any ethical background for law."[37] But this is precisely the question legal realism and positivism provoke, namely, whether law is "essentially" a matter of force or whether its essence lies in justice.

Law As Force

The question at issue is not whether force is part of the phenomenon of law, but the theoretical question of whether law is to be defined, as it is in much modern jurisprudence, as force.

The impossibility of creating a coherent theory of law in terms of force is illustrated by Soviet jurisprudence. The struggle for law in Russia today is really a struggle for some basis for a legal theory. The Marxist premise, which holds that legal principles are only "economic reflexes," led to the conclusion that law "is but the will of [the economically dominant] class made into a law for all,"[38] a conclusion which meant a complete revolt against the very idea of law. This attack upon law was based not only upon a revolutionary psychology couched in such phrases as that "marxism declares a merciless war against bourgeois legal concepts. . . ."[39] Even the calm theoretical task of Marxist jurists led Pashukanis to write that it was not the intention of the Communists to replace bourgeois law with Soviet law. Rather, Pashukanis argued that "the withering away of the categories of bourgeois law (exactly the categories, and not of this or that particular rule) can under no circumstances mean their replacement by some new categories of proletarian law. The withering away of law in general, that is, the gradual disappearance of the juridical element from human relations"[40] is what Marxism seeks to achieve, or predicts will happen. Goichbarg wrote that "we refuse to see in law an idea useful for the working class." This breakdown of legal theory had the practical consequence that "from November 1917 to 1922, law was formally lacking."[41]

Marxism is quite right in dispensing with legal theory as well as with pretentions of legality in practice if the essence of law is conceived of as force. This follows from the elementary logic that, if you define law as force, you define not

---

[36] *Holmes-Pollock Letters,* (ed. by Mark De Wolfe Howe), Cambridge, Harvard University Press, 1951, vol. I, p. 163.

[37] *ibid.,* p. 275.

[38] Karl Marx, *Communist Manifesto,* Chicago, Henry Regnery Co., 1950, p. 28.

[39] Gsovski, "The Soviet Concept of Law," 8 *Fordham Law Review* 4.

[40] Cf. his "Theory of Law and Marxism," in *Soviet Legal Philosophy,* 122.

[41] Rudolph Schlesinger, *Soviet Legal Theory,* London, K. Paul, Trench, Trubner, and Co., 1945, p. 79.

law but force. To be sure, the Marxist rests upon the notion that law, like morality, is ideology. Ideology in this connection is the pretention that the interests of the economically dominant class, which are determined by the relations of production, rest on eternal or ultimate moral principles. To say that law is simply the embodiment of ideology caused by the class struggle means, however, that in a classless society there would be no law since there would then be no dominant class seeking to exert its will over another class.

The Soviet jurists have become aware of the need for some theory of law to overcome this simple negation of law. But from the positivistic premises from which they start and with their identification of law with force, their jurisprudence is still incapable of producing a theory of law. "Even today," writes Rudolph Schlesinger, "it is more difficult in the USSR than elsewhere to establish a clear-cut distinction between administration and legislative acts,"[42] which means that Soviet legal theory cannot differentiate between law and an arbitrary command. The reinstatement of Soviet law today does not mean the abandonment of the concept of law as force. The development of a system of courts does not rest upon any concept of fundamental human rights:" . . . the so-called private rights in Soviet Law are not *actual rights of private persons,* but, *rights established by the state.*"[43] The courts are set up not to defend private rights but to provide the government with an organ of power "completely under the control of the vanguard of the working class." If the law is force and the courts are simply the agency of the "vanguard", why, asks Professor Berman, "erect this elaborate structure of rights and procedures?" Because, in the words of Krylenko, "a club is a primitive weapon, a rifle is more efficient, the most efficient is the court."[44] Hence, early Marxism led to the theoretical repudiation of the category of law. The current reinstatement of law rests upon no new Soviet theory but rather is consistent with the early Marxism, for Soviet law is self-consciously based upon class interest as indicated in a statute which reads: "when passing a decision upon a case, the People's Court shall apply the decrees of the workers' and peasants' government."[45] Decree has replaced law. Thus, even though Pashukanis is discredited now as the theorist of law, the Soviet government still follows his principle: "We need the utmost elasticity," said Pashukanis, and so "we do not have a system of proletarian law."[46] Insofar as there is "law", it rests upon force, which is to say that Soviet law is lawless, chiefly because, as Lenin has said, the Soviet system is a "power unrestrained by any law and based upon force and not law."[47]

---

[42] *ibid.*, p. 60.
[43] *ibid.*, p. 95.
[44] Harold Berman, *Justice in Russia,* Cambridge, Harvard University Press, 1950, p. 28.
[45] Gsovski, *op. cit.*, p. 20.
[46] *ibid.*, p. 31.
[47] *ibid.*, pp. 17-18.

Thus, Soviet experience gives us a good example of the breakdown of legal theory and the impossibility of deriving a satisfactory conception of law from the "imperative theory" of law which identifies law with force. Actually, however, not even the Soviet legal system is totally insensitive to the consideration of justice. Even though it is true that every system of law is affected by the ideological element which causes groups to define justice in terms of their self-interest, it is also true that there can be no law in the true sense of the word which does not consider justice as its essence.

The theoretical problem here is created because of the notion that the phenomenon of law has to be defined as it exists at any specific moment. And since the particular notion of justice a system of law may embody at that moment may be a very questionable notion of justice indeed, the illicit conclusion is drawn that the essence of law cannot be justice because there is no agreement upon essential justice. But law is a dynamic phenomenon just as the life of man is. We could not consistently hold, as it is in some quarters, that man is not essentially a moral being just because no man has ever attained perfect righteousness. The question of morality would never arise unless the actual behaviour of man deviated from some basic rightness in human conduct and relations. Similarly, the need for law would never arise unless the relations between people and things at any time disturbed some essential order. We have already discussed the difficulty of discerning the content of this essential order, but it is instructive that every system of law struggles to clarify that order. At this point, Soviet law actually takes on the character of natural law since it presumes to use the law to create the "right" relations between all the factors of production. But if instead of looking at the law in static terms only we see it as a process for achieving purposes, the intimate relation between law and justice becomes apparent. Then the idea of justice becomes just as central to the nature of law as the idea of the good is to the nature of man. And it is precisely because the law in some way seeks to help man achieve the good that the law itself needs to be informed by the good, that is, justice. Moreover, the understanding of the element of force in the phenomenon of law is clarified when we conceive of law as justice.

Law As Justice

Theologians have frequently looked upon "the powers that be" without asking whether they were just, for those powers, after all, "are ordained of God."[48] Moreover, theologians have been able to justify the coercive power of the state in its most ruthless forms on the grounds of man's sinfulness. Yet the fateful passage in the Book of Romans makes it clear that the power of the state is to be obeyed not solely because it is power, "but also for conscience' sake." That is to say, power is put into the context of conscience, or justice. The biblical view nowhere amounts

[48] Romans 13:1 ff.

to calling law sheer power. It does legitimize power, but only power which follows the contours of justice. Power is less than love, and law is less than love, just as the existential status of man is less than his essential nature. But these all bear a relation to each other. For, as we indicated in the previous section, the source of man, like the source of law, is the creative power of God. The law can be interpreted as an extension of God's creative power, for it has the effect of fashioning man by ordering his conduct. Both creation and law are means through which power or force bring form into being. Creation achieves the initial form of all things whereas law seeks to restore aspects of creation to its essential form and norm from which it has deviated. Besides restoring behaviour to its essential norm, which may indicate a static view of human nature, the law also seeks to lead conduct in the direction of fulfilling man's potentialities, thus raising conduct to an ever higher level of possibility, that is, closer and closer to the requirements of love. Thus, theology views law as part of the act of continuing creation, and like creation, law has behind it the element of power; but the power behind law, like the power behind creation, is limited to the bringing into being of essential form — in neither case is power arbitrary.

It is illuminating to see how closely the curriculum of a modern law school mirrors this theological interpretation. For theology holds that the original justice is man's spontaneous right relation to man and things as well as to God. Thus, the first edition of the law lies in God's creative act wherein He forms man to live the life of love. The second edition of the law is the Decalogue, which is a more specific (but less dynamic) elaboration of the life man ought to live. Whereas the life of love would lead man to relate himself properly to his fellow man, his actual prideful life obscures his duty and the specific instructions of the Commandments become necessary. Subsequently the "secular" law follows the general direction of these commandments, though now deprived of their theological basis. For example, "Thou shalt not steal" is expanded into the more intricate Law of Property; "Thou shalt not bear false witness," lurks behind the Law of Contracts, "Thou shalt not kill," lies behind part of the Criminal Law, "Thou shalt not commit adultery," still represents a fundamental element in the Law of Domestic Relations. That is, law as we know it in the actual legal system is involved in the process of creating the kind of relations God intended in His creative act. The law is misconceived, however, if it is seen simply as force; its essential nature is involved in working toward relations consonant with man's essential nature. To be sure, the coercive aspect of law cannot create the life of love, but its function is chiefly to bring to bear those conditions which will make love possible and at least to restrain behavior which would obstruct the possibility of mutuality and love.

Again, however much we may see in Augustine the spirit of realism, we nevertheless see in his theology the comprehensive unity between the ethics of

love and the phenomenon of law. His great concern for justice in government led him to say that, "If . . . a commonwealth be an estate of the people, and that they be no people that are not united in one consent of the law; nor is that a law which is not grounded in justice; then it must needs follow, where no justice is, there no commonwealth is."[49] That is, the "rule of law" requires not bare force but justice. And Augustine defined justice not solely as a corrective act but rather in a way that provides a perspective for curbing totalitarian law on the one hand and abetting man's higher ethic on the other. Hence, taking justice to mean the act of distributing to everyone his due, Augustine felt the "what is due" can best be designated in religious terms. Consequently, Augustine did not begin with what man owes to man, but with what he owes to God. For Augustine, justice is incomprehensible if it is limited merely to the relations between man and man: the primary relation is between man and God. (This, I take it, is the ground of our objection to totalitarian "law" even today.) Thus, "If man serve not God, what justice can be thought to be in him? Seeing that if he serve not him the soul has neither lawful sovereignty over the body nor the reason over the affections."[50] What is more, collective justice is impossible apart from this individual justice: "Now if this justice is not found in one man, no more then can it be found in a whole multitude of such like men. Therefore, amongst such there is not the consent of law which makes a multitude a people."[51] Again, referring to actual law, "What justice is that which takes man from the true God?"[52] Augustine clearly saw the relevance of the ethics of love to the collective life of man and indeed saw it as the essence of justice. Love is the perspective for the fashioning and criticizing of law. The law derives its character as law from its being bound by love. Without the ethics of love, Augustine held that there could be no true orderliness since nature would be disturbed by man's willfulness. Without love there could be no justice for there would be lacking a cogent motive and pattern for man to render to other men their due. But most important of all, without love as a gift of God's grace man could not love the proper things properly. Love therefore becomes the essence of the law, and indeed love is the New Law. Lest this be considered too idealistic and too remote, we need only consider the bearing of love on law by referring to the moral force this ethic generated against the laws of racial segregation. And lest we consider this ethics irrevelant to the collective life of man, we need only reflect on the fact that its repudiation made possible the laws of segregation. This is not to say that theology wants to re-write the whole law. It does say that the essence of law is justice and that the ethics of love bears directly upon the formation of law as well as on the intimate conduct of man. Even Calvin could say that "All nations are left at

[49] *The City of God.*, XIX, 21.

[50] *ibid.*

[51] *ibid.*

[52] *ibid.*

liberty to enact such laws as they find to be respectively expedient for them; provided that they be framed according to that perpetual rule of love."[53]

III. *The Ends of Law*

The most characteristic feature of law is that it is freighted with ***purpose***. No system of law, however, has an unambiguous vision of the purpose it attempts to achieve. But likewise there can be no law or system of law which does not attempt to achieve certain values or goals. The concept of purpose is complex, for law seeks to achieve many kinds of purposes, and frequently it seeks to achieve these simultaneously. The complexity arises from the fact that in every instance the object of the law's concern is man, but man is at once an individual and a member of society and also bears a relation to things. There are values which are personal while other values are collective or social and the law must consider both types. The value of individual freedom, for example, needs to be viewed alongside the value of social order, and inevitably there will be some serious interaction between these different values. Moreover, there is the value of stability in the law, a value which affects chiefly the judicial process where a steady continuity in the law provides a desirable predictability. At the same time, both the individual as well as the community can gain new values from a periodic reconception of the law's purpose. This is the reason Justice Cardozo warned against the danger of depriving the judicial process of its "suppleness of adaptation to varying conditions"[54] and Justice Douglas argued that in constitutional law *"stare decisis* must give way before the dynamic component of history."[55] The variableness of the law's purpose, however, does not mean either that the law is not to be understood chiefly in terms of the purposes it seeks to achieve or that the concept of purpose is hopelessly relative.

"Purpose" as a Decisive Element in Law

The concept of purpose is the key concept which differentiates the theory of legal positivism from natural law theories. But ideas of purpose are so dominant in law that even the juristic theories which would repudiate the assumptions of natural law are bound by the purposive element, a good example of which is found in Jeremy Bentham.

Bentham leveled a devastating attack upon the theory of natural rights, implying that it is not the purpose of law to protect such non-existent rights:

> All this talk about nature, natural rights, natural justice and injustice proves two things only, the heat of passion, and the darkness of understanding . . . Property the creature of law? — Oh, no — Why not? — Because if it were the law that gave

[53] *Institutes*, IV. 20, 15.

[54] In *Landis v. North American Co.*, 299 U.S. 248, 256.

[55] Douglas, "Stare Decisis," 49 *Columbia Law Review*, 735, 737.

> everything, then law might take away everything: if everything were given by law, so might everything be taken away.
>
> The case is that in a society in any degree civilized, all the rights a man can have, all the expectation he can entertain of enjoying anything that is said to be his is derived solely from the law. . . . Till law existed, property could scarcely be said to exist. Property (as well as all other rights) and law were born together and die together.[56]

Not the protection but the *creation* of rights is the way Bentham saw the function of law. But even though Bentham would add to the state's monopoly of the administration of the law the other monopoly of the creation of law, he could not thereby divest the law of its purposive aspect. Indeed, he accentuates this purposive element, for now whatever values society will achieve derive from the purposive ideas of the legislator. Since rights and duties spring first from the law, the law is the matrix of purpose, both individual and collective. That is, Bentham assumes that the way man ought to behave is determined not by "nature" or "natural justice" but by the law. But to argue this way is to assume that the law is some abstract machine independent of the rational consciousness of man. Bentham held that human reason could not produce any natural rights, only a "bastard brood of monsters."

Actually, Bentham's theory of law is a natural law theory, for the law, as he sees it, derives its guidance from the nature of man. The end of law or the purpose of law is for Bentham not just any end (even though he argued that "push-pin is as good as poetry"); though the law creates the norms of behaviour, the legislator is guided by the nature of man in fashioning the law. This is a rational theory of law, for it presumes that the nature of man can be known and that the essential element in human nature is universal. Moreover, Bentham achieved his great influence upon both legal theory and practice by insisting that jurisprudence must rest upon his conception of man, i.e., upon utilitarianism. For, to describe law in terms of utilitarianism is to provide a "language [which will] serve as a glossary by which all systems of positive law might be explained, while the matter serves as a standard by which they might be tried."[57] For one who follows in the tradition of Hobbes and the empiricism of Hume, it is also noteworthy that Bentham should say that "There is no form, or colour, or visible trace, by which it is possible to express the relation which constitutes property [or any other rights]. It belongs not to physics, but to metaphysics: it is altogether a creature of the mind."[58] Thus, the purpose of law is to satisfy the nature of man, a nature which can be understood rationally and a nature from which the "ought" for law can be lifted. While

---

[56] Jeremy Bentham, *The Limits of Jurisprudence Defined*, (Everett Ed.), New York, Columbia University, 1945, p. 84.

[57] Elie Halévy, *The Growth of Philosophical Radicalism*, London, Faber and Gwyer Ltd., 1928, p. 63.

[58] *ibid.*, p. 47.

Bentham enumerates the purposes of law as being: "to provide subsistence, to aim at abundance, to encourage equality and to maintain security";[59] the whole enterprise is reducible to the simple formula of maximizing pleasure and minimizing pain. For, Bentham argues that "nature has placed man under the empire of pleasure and pain" and that "we owe to them all our ideas, we refer to them all our judgments, and all the determination of our life."[60] The purpose of law, then, is to order the conduct and relations of men in such a way as to minimize pain and maximize pleasure and thus achieve the greatest happiness of the greatest number. That is, the purpose of law is dictated by the nature of man.

Bentham's thought illustrates the impossibility of thinking about law without having some conception of the ends of law. Moreover, the ends of law are in every case determined by our conceptions of human nature. Thus, juristic systems which begin by denouncing morals and by refusing to allow the relation between law and morals frequently end simply by substituting a new morality. Not only is this true in Bentham's case, it is also true in Soviet law, whose function, says Golyakov, is "the fundamental remaking of the conscience of the people. . . ."[61] The question then is no longer *whether* the doctrine of man is fundamental in determining the purposive element in law, but rather *what* conception of man is to be used.

Theology and the Ends of Law

Few theologians would insist that the purpose of law should be deduced entirely from the Christian interpretation of man. Aquinas argued that the function of law is to achieve the "common good," for he followed Aristotle's notion that "lawgivers make men good by habituating them to good works." Earlier, Augustine had seen in the positive law the agency whereby the disruptive behaviour of anarchic man was subdued, for "when the power to do hurt is taken from the wicked they will carry themselves better being curbed."[62] In a similar way, Luther looked to law chiefly as the means of achieving a minimal order. But Calvin looked to law for far broader purposes, saying that "civil government is designed as long as we live in this world, to cherish and support the external worship of God, to preserve the pure doctrine of religion, to defend the constitution of the church, to regulate our lives in a manner requisite for the society of man, to form our manners to civil justice, to promote our concord with each other and to establish general peace and tranquility."[63] Calvin goes much further than any contemporary theologian would seem to follow him, for here he almost accords to the civil law

---

[59] Cf. Wolfgang Friedmann, *Legal Theory*, (3rd Ed.), London, Strauss and sons, 1953, p. 115.

[60] Jeremy Bentham, *Principles of Legislation*, (tr. from 2nd corrected and enlarged edition by John Neal), Boston, Wells and Lilly, 1830, Chap. I.

[61] Cf. Gsovski, *op. cit.*, p. 16.

[62] *City of God*, XIX, 21.

[63] *Institutes*, IV, 20, 2.

the function of perfecting human life; in another place he had said more explicitly that "the law inoculates a conformity of life, not only to external probity, but also to internal and spiritual righteousness."[64] On the whole, Karl Barth presents a view closer to Luther's than to Calvin's, though he can be identified with neither since his chief insight here seems to be almost this: theology does not look for the law to be shaped to fit the Christian view of man — it only asks that the state give the church the freedom to preach the gospel.[65] Even Emil Brunner who has self-consciously sought to formulate a distinctively Protestant theology of law resists, in the end, any attempt to use the Christian ethics of love as the basis of the law, for, again, he sees law as dealing with impersonal relations while love is the ethics of personal encounter. At this point he resembles the Reformers, for, as he has said, "the connection between justice and love was not made clear by the Reformers."[66] This negative drift in theology regarding the purpose of law led Ernest Troeltsch to comment that in the past the Church has sought to Christianize the state in such an indirect way that "all that this 'Christianization' amounted to in the end was that everything was left outwardly as it had been before."[67]

A more creative relation of the Christian view of man to the purposes of law must be asserted. We have argued that the whole concept of law gets its deepest meaning when understood in the context of man's full nature, when viewed in relation to how man ought to live as required by his essential nature. The purpose of law must be affected by the purpose of man, for the functioning of law will have a concrete bearing upon the conduct and even motives of man. The law can determine at many points whether there will be any possibility for man to live according to his essential nature. If the theological view of man has no bearing upon the law, then it has no bearing upon the life of man. It is true that the law deals chiefly with the outward acts of man whereas the ethics of love strikes at the inner life. Nevertheless, it is intolerable to hold that for the purposes of law, man's essential nature must be considered as governed chiefly by self-interest, while for the purposes of personal ethics his nature should be defined in terms of love. On this point, Bentham was clearer and more consistent than those theologians who do not build their theory of law upon man's essential nature, for he brought about a specific reformation of the law of England simply by insisting that the law should conform to the ethical nature of man.

---

[64] *ibid.*, II, 8, 6.

[65] Karl Barth, *Against the Stream*, London, SCM Press, 1954, *passim.*; Cf. Reinhold Niebuhr, *Nature and Destiny of Man*, II, p. 279; also, Jacques Ellul, *Le Fondement theologique du droit*, Neuchatel, Delachaux, and Niestlé s.a., 1946, p. 81.

[66] H. Emil Brunner, *Justice and the Social Order*, (tr. by M. Hottinger), New York, Harper and Brothers, 1945, p. 263, note 5.

[67] Ernst Troeltsch, *The Social Teaching of the Christian Churches*, (tr. by Olive Wyon), New York, Macmillan, 1931, vol. I, p. 159.

Thus, various forms of utilitarianism and pragmatism have supplied the law with its value content chiefly because theology has rather consistently disengaged its more important insights from the theoretical treatment of law. It seems far more consistent to hold that human institutions, insofar as they are the products of human acts, come under the same kind of critical judgment as the individual does. As the redemptive quality of love seeks to transform human life, so also its force can affect institutions. And this is peculiarly true in the case of law inasmuch as the law can so specifically abet or frustrate the demands of Christian love. The idea of love is no more abstract and void of content than the notion of "pleasure and pain." Moreover, creative love is far more clearly a standard of "ought" than is the pleasure-pain calculus. To say that men tend to seek their own pleasure does not mean that they "ought" to. Yet, Bentham and Mill not only made happiness the standard, they even went so far as to give to the legislator the task of defining the contents of this happiness, thus making the law the instrument for moralizing man. Moreover, the ethics of self-interest, which at first expressed itself in individualism and a *laissez-faire* attitude by the government, gradually resulted in collectivism since the government now undertook to educate man to his self-interest and to create the conditions of his happiness. While it would take us too far afield to elaborate in detail how the ethic of love could clarify the ends of law, some indication can be given of how love becomes relevant to the ends of law.

Since the ends of law grow out of a general view of what man is striving for, the standard of Christian love, when defined and expressed in its full nature would provide a basis for the more specific ends of law. If the essential nature of man is love, which on the collective scale means brotherhood, then love provides a very specific insight into the manner in which society ought to be organized. This is not a utopian idealism but the concrete ethics of mutual concern. Its power flows from the conviction that brotherhood or fellowship is not only a primary need of man but that the ethics of love alone can produce it in its most creative form. What this means for the law is that the end of law must not be simply *order*, for order can turn out to be established disorder when considered from the point of view of how man ought to be related to his fellow man. Whenever the law divides races or groups against each other and creates a condition which fragments the human community, the end of law is as sinful as the motives which lie behind its formulation. Moreover, the ethics of love has the effect of treating men as persons and not simply as things, or objects to be manipulated. Thus, the impact of Christian love is to clarify the nature of social order so as to create those conditions which make brotherhood possible. The law cannot put the quality of love into the behaviour of men, but it can create conditions which can make the ethic of love impossible. When Christian ethics becomes operative in the legal sphere, as it did during the rise of modern liberal democracy, it acts as a fundamental restraint upon power and control chiefly through its theological element. The law, when it

recognizes that man possesses a purpose which he derives not only from nature or the state but from God, is limited in what it can legitimately impose upon man. Totalitarian law would thus be thoroughly inconsistent with Christian ethics for it would claim from man an allegiance which can be rendered legitimately only to God; it could also seek to force him to break the bond of fellowship with his neighbor, an act the Christian ethic would have to criticize. The ethic of utilitarianism could not supply the basis for resistance or criticism, for on principle the government would have the right to define the meaning of happiness. But no government can consistently alter the essence of the Christian ethics, for it can never define love as hate, or fellowship as discrimination. *Actually*, the government can do all these things — its laws can and do violate the ethics of Christian love. But when the law is conceived, as is the life of man, as a dynamic unfolding and a constant striving toward ends and purposes, deflected by sinful deviations and demonic idolatries, it becomes all the more necessary that the full force of the judgment of love as well as its redemptive power should be brought to bear upon the legal order as well as the individual — they cannot be abstracted from each other. Thus, the theology of law would insist that the concept of *order* can be abstract and ambiguous and can be achieved in ways which would do violence to the essential nature of man and therefore needs to be reconceived from the perspective of creative love.

Similarly, if the law seeks to achieve the goal of *freedom*, the intricacies of such an end as freedom need to be clarified. For, like order, freedom can mean many different things, as implied in such varying notions as laissez-faire and "the truth shall make you free." Freedom, primarily, is the presupposition of both law and ethics. In this sense, freedom means that men are capable of alternative modes of behavior. This is a metaphysical notion characterizing the nature of man's being. It is metaphysical freedom which is the presupposition of law, for the law assumes that human behavior is indeterminate—that man faces and makes real choices. It is the function of law, like the function of ethics, to order behavior or make it determinate. Now if it is one of the ends of law to make possible human freedom, this freedom, as an end of law, must differ from the freedom which is the presupposition of law, for this latter freedom already exists before the law comes into being and could not therefore be the product of law; one does not legislate anarchy, for anarchy exists before the law. Freedom, which the law seeks to bring into being, must therefore be something quite different from mere *laissez-faire*. It must be a structured or responsible freedom. When Christian love informs the jurist, he views freedom as a mode of behavior which tends to increase rather than decrease the scope of fellowship or community. It is a mode of behavior which has a genuine concern for the neighbor and not only for the self. Indeed, the specific impact of the ethics of love here is to reconceive the meaning of freedom, shifting the focus from self-interest to a genuine concern for the other, treating the other not only as a means but as an end, not as a thing but as a person. The argument here is not so

much that the law must be in every sense "Christianized," but that because law inevitably drives towards ends, these ends must be clarified not alone by pragmatic concerns and utilitarianism but also by a more adequate ethics of creative love.

To be sure, there are some limitations upon the efficacy of law. The jurist can shape the law to follow close upon the lead of morality. But while the law can secure freedom, it cannot make men use it wisely or responsibly; it can regulate marriage but cannot make partners love or forgive each other; it can uphold legal rights but cannot thereby exhaust the full moral relations between parties. As Ames once said, "The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not."[68] Moreover, no formulation of justice ever escapes the further and constant criticism love brings to the law. This limitation upon law is inevitable, for theology sees man's moral predicament as a virtually permanent condition. There is no moment in time when man achieves perfection, for, as long as he lives, he faces the possibility of choice, and in the process of expressing his freedom he invariably insinuates his selfish interests into his behavior. Thus, the actual laws even Christians create partake of the stubborn sin of pride even while raising conduct to a higher level. Moreover, the law cannot reach into the sensitive seat of motive, but must stop short of this final moral dimension. Yet this limitation of law is the outcome of the limitation of man. Everything depends, then, upon how we deal with this human limitation. Earlier theories made what appears to be an unwise deduction here, for because of the weakness of human nature they legitimized arbitrary force and refused to see the relevance of the power of love upon the legal order. To admit the perversity of man does not alter the higher possibility to which man is called. It is no wonder that the biblical view is that love is the fulfillment of the law, for by this it means to say that the fulfillment of law follows upon the fulfillment of man's essential nature.

---

[68] Ames, "Law and Morals," *22 Harvard Law Review*, 97, 112.

The Christian Lawyer as a Public Servant

WILLIAM S. ELLIS

This paper is concerned with the general topic of the Christian lawyer as a public servant. The paper attempts to describe very briefly the lawyer in his practice of law and in his relation to the legal and political systems and the relevance of the Church to the lawyer in each of these areas. The topic is a difficult one, for the writer would suggest that the lawyer by his very trade in "a Pharisee" and rarely a Christian.

Yet lawyers constitute one of the most important and influential groups in this country. From the days of the pioneer it has often been the lawyer with his volume of Blackstone who has carried with him the bare minimum of the common law. To him has traditionally been delegated the position of representative, administrator, arbitrator, and community leader. To him the community has brought its small and large problems. Due to this peculiar position of trust, it is important to analyze what difference it makes if a lawyer is a Christian.

The first question then is what the characteristics are which the lawyer brings from his profession and which affect his efforts as a public servant. What type of professional personality and methodology does he bring to his tasks and what effect do these have on his public work?

The Lawyer

The lawyer has an interstitial position in our society. His personality is vicarious. His approach is pragmatic. His objective is to represent his clients, keep them out of court if possible, and win his case. He has a two-fold responsibility. He must represent the interests of his client, and he must be an officer of the court. Both functions are of crucial importance. He is a national schizophrenic at his worst, and a statesman at his best. In his hands rests the developing concept of due process. He can be the social engineer but is always the master of compromise and negotiation. It is this character which the lawyer brings to his public work.

The lawyer's position in our society is interstitial.[1] He is not a member of any economic group such as the worker, the farmer, the business man, the white collar worker, or the financier. His function is to be situated in the interspaces of these different groups. He may leave his profession and become a member of any one of these groups, but as a lawyer he is the representative of the interests of his client. On one day he can represent a corporation, and on the next he can plead most eloquently the grievances of a labor union. His wares are to be sold to any

Mr. William S. Ellis is an Assistant United States Attorney in New York City.

[1] An interstice is that which intervenes between one thing and another, especially between things closely set, for example, the role of mortar in a brick wall.

bidder. There is no one group with which he identifies himself, for his self interests are those of his present client.

One may question this term "interstitial role" when one observes lawyers who have worked for years for the government or in the legal department of a corporation or an insurance company. Such a long association may mean that the lawyer has completely identified himself with his client and assumed the coloring and characteristics of that client. When this occurs, the lawyer may slowly lose his interstitial role and become for all intent and purposes a member of the group to which his client belongs. Though such a question is valid, the reply is that the well-trained lawyer always understands that he has the right to represent whomever he wishes.

The lawyer who understands his social function will maintain his interstitial role, which is often his strength. When a lawyer has represented all types of clients, he develops a healthy perspective and objectivity towards his trusteeship of the legal system and the type of procedure and substantive law which that system should strive for. He avoids the self-righteousness of the lawyer who has completely identified himself with his client and who is willing to subordinate all considerations (whether procedural or substantive) before that self-righteousness. Indeed, as long as the lawyer maintains this role, the legal system itself benefits; and whenever the lawyer loses this role, both he and the system suffer in the long run.

It is this very interstitial role, so vital to the legal system, which causes the public to regard the lawyer with an air of both awe and irritation. He is the fast talker who gets things done, who can take any set of facts and present them in an intelligent and convincing manner. For many, this ability to argue one side one day and the other side the next day borders on dishonesty.

Such a view is due to a failure to understand the lawyer's role, and it presents a great danger to the public itself. If the public identifies the lawyer with his client, the honest and conscientious lawyer who will defend the unpopular case will suffer. And, the basic freedoms which are often at stake in this type of case will equally suffer. It is the public itself and the legal system which are the poorer for this grave misconception.

The lawyer's personality is vicarious. He is always the agent. He represents the interests of his client and submerges his own character. The client approaches the lawyer and presents a problem where the law is clear. However, the demands of the personal ethics of the lawyer may be equally clear and opposed to the demands of the client. Though the lawyer personally would never take such a

position or make such a request, still he may represent his client. The oft-quoted example is an oral contract for the sale of property which a client wishes to ignore in the face of a better offer. The Statute of Frauds is his weapon.

The problem for any lawyer in his relations with his client is — to what extent does he remain solely the technician and present only the vicarious personality. Certainly, there are many occasions when a client wants more than mere technical advice, and yet there are many more occasions when the client wants to know what is the law and whether the lawyer "can do it." Clients as a rule are interested primarily either in dollars and cents or in their personal liberty and in not much more. The lawyer may practice law and never permit his own beliefs and principles to come to the fore. He can be a technician and remain strictly within the requirements of the law.

There are many lawyers who would insist that this is the only proper function of the lawyer, that he has no business interjecting himself into the case. And there is much to be said for this view since the interjection of self into a case often reduces one's objectivity and blunts one's analysis. Yet this is not the sole answer, for any lawyer knows that there are occasions when he gives personal advice to his client and when the situation is so outrageous that he refuses to proceed any further. These latter occasions are rare, and often depend on the type of case and the relationship which exists between the lawyer and the client. However, this conflict of "vicarious" as opposed to "personal" does raise a serious question whether the lawyer should legitimately be expected to minister to the needs of his client, other than legal.

As opposed to this representation of the interests of his client, the lawyer is also an officer of the court. At its most superficial level, this can mean that the lawyer owes the judge a certain respect, that the lawyer is to be honest and to abide by the rules and procedures of the court. At a more fundamental level, however, the lawyer is the custodian of the legal system itself and of the concept of due process. Through his pleadings, he can call to the attention of the court that a client has been deprived of his property or liberty without notice of the deprivation or a fair opportunity to be heard. It is he both as advocator and as judge who pleads and decides that certain practices in the enforcement of the law do not conform to our civilized standards or are basically unfair. Through the canons of ethics and the rules laid down by the Bar Association and the courts, much of the procedure and practice of lawyers is determined.

In what way do these lawyers and bar association committees decide that a certain procedure is unfair and a denial of due process of law? Into what philosophical system, if any, do they delve in order to find criteria for their recommendations? They find criteria from some place. What causes a lawyer to raise the point of due process in the first place?

The lawyer has this unique trusteeship on which the vitality and justice of the legal system depends. If he fails to fulfill his responsibility at this point, the entire legal system suffers. Yet, if he loses his interstitial role and vicarious character, he does a grave disservice to his client. The lawyer has this split personality which has demands seemingly incompatible. How does he maintain a delicate balance between the two? How does he withstand the conflicting pressures?

The Legal System

The second major factor to be understood about the lawyer is the system within which he works. It should not be necessary to dwell too much on this topic, but it is important in terms of its effect on the lawyer.

The lawyer lives and works within a system of advocacy. This system presupposes that when two opponents devote their full ability to presenting the interests of their client, the strongest points of each side will be best presented to the court. The effectiveness of the system often depends on the ability, brilliance, and persuasiveness of the lawyer.

This system presupposes that the role of the judge will be to a great extent passive and restraining. The judge listens to the arguments of both sides. He asks questions to clarify his own understanding. He reads the cited cases and analyzes the problem. Then he decides the case and renders judgment. Though he has tremendous freedom within the limits of the case before him, still those limits are set by the factual situation of the case and the issues presented by counsel for both sides. The lawyer assumes impartiality, fairness, and neutrality on the part of the judge and attempts to present all the facts and law which the judge will require in rendering a decision.

Within this system, the lawyer assumes that there are certain rules concerning the presentation of evidence. Over the centuries these rules have grown up concerning what type of fact has probative value, relevancy, and materiality. The purpose of these rules is to present only the most dependable fact in deciding the issue before the court. For example, the hearsay rule, which is known to all laymen, states that witness A may testify to what he said and did, but A cannot testify concerning what B said unless B's words and actions fall within certain exceptions. Since B is not on the stand, he cannot be put under oath and above all cannot be cross-examined. The court has no safeguard to test the credibility and veracity of B's statement. A's testimony about B's statement is excluded.

The lawyer learns and almost instinctively applies these rules of evidence. He tends in analyzing a case to eliminate certain facts if he cannot find a way to bring them within the accepted rules of evidence or if they have no probative value. A lawyer may "know" something but be unable to "prove" it. This lifelong training develops a certain perspective and methodology so that the lawyer often forgets the

purpose of the rules of evidence and applies them by habit to every problem with which he copes, legal or not.

Within this system and with these rules, the lawyer faces only the problem immediately before him. He is essentially a pragmatist. Though he may be a Protestant, Jew, Catholic, liberal humanist, or a positivist, he essentially is a pragmatist as a lawyer or judge. As a lawyer, he limits his attention only to those issues which are directly before the court, and he does not bother himself with imaginary issues. As a judge, he will not and usually cannot render advisory opinions. He will render a decision which settles only that case before him. It is true that he will consider to some degree the effect of his decision on other cases, but he will not speak to imaginary situations. This is the province of the law student and professor.

With all this the lawyer works. He listens to the statement of facts by the client. He hunts, searches, and probes for more facts. Then he begins to refer to cases where similar factual situations have arisen. He draws from the cases the rules of law. On the basis of these rules, he begins to distill the issues which the facts present. Then he goes back to his cases and considers how the rules of law and the reasoning of the courts apply to his case. As he wrestles towards a presentation which will be most favorable to him, he re-analyzes the facts and the law until he has reached the most favorable view of his case. Then, he proceeds to a disposition of the case. This may involve negotiation and compromise. Or it may require argument or trial before a judge. Whatever action he deems proper to represent his client's interests, he pursues.

This is only a meager and superficial description of the legal system. At best, the system permits the analytical and brilliant lawyer to develop a precision, breadth of view, and decisiveness which is admirable. At worst, it permits a quibbling short-sightedness and blindness in which all types of devils may lurk.

The Objectives of the Legal System

It is relevant to ask what the objectives of this legal system are within which the lawyer works. I have suggested above that the client is interested either in dollars and cents or in his personal liberty. The more he acquires of either, the happier he is. Yet in a larger sense, I would say that the objective of the legal system is justice. Terms such as law and order for the nation or the protection of the property and personal rights of each citizen and group are merely a paraphrase of justice in terms of a specific situation.

Before proceeding further, it might be asked if an objective of the legal system is love or mercy. The answer, I would suggest, is no. Love and mercy may be either fundamental assumptions underlying the system or by-products of the system, but not stated objectives. However, some might argue that love and mercy are

objectives. For instance, when the lawyer for the plaintiff in a negligence case plays on sympathy and emphasizes all the factors which create sympathy in order to be awarded a larger sum by the jury, one might say the lawyer is asking for mercy and that the jury system serves this objective. Or when a defendant is about to be sentenced for a crime, one might say that his counsel when he throws the defendant on the mercy of the court is asking for mercy. Yet the ready answer must be that the jury verdict merely took into account those factors such as suffering and measured them in terms of monetary value. The plaintiff received his monetary due. In the case of the criminal, the judge took into account all the factors presented by the lawyer in measuring the degree of culpability and thus the type of punishment merited. In neither case was love and mercy an objective. Theoretically, at least, the legal system does not set up love and mercy as an objective.

Assuming this, the Christian asks a number of questions. What do we mean by justice? Of course it is man-made justice. How do we determine what is man-made justice? I would assume that each generation of lawyers would answer this in the same way: one analyzes the cases up to that point, one weighs the interests of the opposing parties, one considers public policy, and one considers the future effect of the proposed rule of law. After weighing all these factors, one comes to a decision. Where each generation would perhaps disagree is, first, what weight to give to each of these factors in arriving at a decision and, second, what some of the basic assumptions underlying these factors are. The weight which one gives to each of these factors often camouflages other assumptions which may or may not be articulated.

The Christian would probably ask finally whether there can be any type of justice apart from God's love and mercy. Assuming one would answer no, the next question is how God's love can in any way affect a legal system which makes no pretense at attaining love and mercy.

Political Life

The lawyer is expected, more than any other citizen except possibly the business man and the financier, to participate in the political arena and in public life. Of course, judges, district attorneys, judicial referees, and trial examiners have to be lawyers. However, it is often assumed that the executive and the legislator will be lawyers and that legal training is an excellent background for any type of government service.

The purpose of this section will be to touch briefly on the problems which any public servant must face such as power, group relations, and conflicting loyalties.

The fundamental purpose of any political system is the organization of power in such a manner as to attain certain objectives. There are a few basic objectives

which any political system must accomplish such as the maintenance of law and order. Whatever other objectives the political system attempts to accomplish are probably peculiar both to the cultural, historical, religious, and philosophical heritage and to the economic and social conditions of each country.

This power, arising from many and varied types of groups, has to be organized in such a way as to recognize the legitimate interests of varied groups and, through compromise, organized into a national unity. In this country the legislator and the executive have the responsibility of recognizing, protecting, and extending the interests of different groups and constituencies and of effecting a compromise.

A group has a personality and a behavior pattern which distinguishes it from an individual. One may as an individual sacrifice one's legitimate interests for the purpose of some more important objective. However, such self-sacrifice of one's interests is rarely possible for the group, for each group usually arrives at a policy decision only after the sub-groups have agreed by a unanimous or a majority vote. Once this policy decision has been taken and the legislator assumes the responsibility of representing that group or constituency, he may compromise but not sacrifice its self-interests.

The legislator and the executive usually have a responsibility to a larger entity in addition to their particular constituency. A senator is responsible not only to his state, but also to the legitimate aspirations, objectives, and welfare of the entire country. The question is how does he fulfill his obligations to both. Realistically speaking, if a senator has important business interests which are strongly in favor of certain legislation, for him to state that such legislation is detrimental to the national interest may well mean his defeat in the next election. His concern for the national interest may be laudable, but his continued service as a senator may be doubtful. In deciding what decision he will make, the legislator will have to weigh the objectives of the group as opposed to those of the nation. Then there follows the art of compromise.

This raised the question. What are the objectives of a nation and how they are formulated? Certainly volumes could be written about this topic, but let us assume that all objectives, however formulated, could be summarized in the general term "justice." We would also assume that love and mercy are not objectives of the political system, though they may be fundamental assumptions or by-products of that system. The questions are obvious: Can there be man-made justice apart from God's love, and if not, how does God's love affect the justice which the political system attempts to attain?

In many ways, the problem of the lawyer as the legislator and the executive is similar to that of the practicing lawyer. His personality is vicarious. He must represent all types of interests in his constituency. And yet he has an allegiance to the entire country. He must live in this conflict, and an exclusive identification

with either interest can be catastrophic. However, usually the lawyer has acquired the skill to live in this conflict as a result of years of practice as a lawyer. The success with which he maintained a balance as an advocate of his client's interests and an officer of the court may well determine his success as a legislator or an executive.

Still, there are differences. First, the legislator having the responsibility for the ultimate decision has far more power than any lawyer representing his client. This power can and often does have a corrosive effect unless placed within a dedicated and committed framework of reference. Second, the national myth and welfare to which the legislator owes an allegiance can be perverted and rationalized in a subtle fashion to further all types of detrimental interests. The lawyer in the courtroom has the judge and legal authority and tradition as a restraining influence. It is true that the legislator has a national tradition, a behavior pattern, a constitution, and governmental checks and balances to restrain him. However, they may take years to be brought into effective focus to counterbalance the legislator. Third, the decision-making process is infinitely more complicated and lends itself to subtlety of pressure far more easily than the practice of law. Fourth, in addition to all the above-stated allegiances, the legislator and executive have a responsibility to their political party.

It is these differences which cause the question of personal compromise to arise. A practising lawyer can live for years within the system of advocacy and be purely objective, rarely raising questions concerning the justice and ethics of his client's claims and relying on the court to make all the decisions. However, as a politician he owes much of his success to his political party and his continued election to office to both the party and different interest groups. To be a successful politician, he must heed many of the demands of these groups. At this point, each man must confront the issue of what he regards as important in his life. However he answers the question will determine what he is willing to compromise.

Thus, the politician faces not only the same type of problem as the lawyer but others peculiar to the legislative process. What guidance, if any, does the Christian faith and the Church offer to him?

The Christian Lawyer and the Church

In the four preceding parts I have attempted to describe briefly the problems which the lawyer faces as a practicing attorney and politician and as a trustee of the legal and political system of the country. The final question is what, if anything, the Christian Faith has to say about these problems. Does it make any difference if this vicarious personality is a Christian? Does it matter to the legal and political system whether or not there is a Church?

Before attempting to answer these questions we might pause for a moment and ask whether a lawyer has a "theology" peculiar to him and his system, and what the characteristics of this "theology" are".

I would suggest that a lawyer does have a faith and "theology." If he were asked to describe it, he might answer as follows: "I believe that as a lawyer I have a responsibility for the administration of justice and the maintenance of law and order. I believe that those disputes which arise in our daily and national life can be most justly and wisely resolved within the system of advocacy which prevails in our courts. It is within this system and by means of the rules of evidence that an impartial and learned judge sees most clearly the issues of each case and will render a decision. I believe that a judge's decision should take into account the body of law which has been developed, the facts of the particular case, and matters of public policy and interest. Though this system is not perfect, it has slowly changed through my own efforts and those of my fellow lawyers to the point where it does result in a very high degree of justice over a period of time. As a lawyer, I consider myself as the representative of the interests of my client, an officer of the court, and a trustee of the legal system."

Likewise, it is suggested that the lawyer has a certain view of man and society. I have often wondered whether a lawyer might conclude that all men, including himself, are liars. They are liars either in that they unconsciously reform, reshape, slant, and color the facts, or in that they deliberately and consciously mispresent the facts. The lawyer is suspicious of even the most "honest" men when property interests and personal liberty are at stake. When he interviews his client and his witnesses, he is continually probing and assessing the credibility of each person.

As for society, a lawyer would be likely to view society as a huge arena where groups and individuals battle for their interests in accordance with certain established rules of procedure. The umpire renders the decisions. Lawyers would probably disagree as to the powers of the umpire and the need for more or fewer rules of procedure.

It is this system and this faith which is the lawyer's world. It is in many respects self-sufficient and self-contained. And when the question of religious faith arises, the lawyer is more than likely to think of the canons of ethics. If one were to ask him about his religious faith, his answers concerning its effect on him and his practice of law would probably vary. One group of lawyers would say that it is irrelevant, and another group would expect the Church to tell them what a lawyer should think and do in every aspect of their practice. The writer would suggest that such answers emanate either from different concepts or misconceptions of the nature of the Christian Faith.

I would assume that a Protestant would state that he believes that God the Almighty has created the world; that He has revealed Himself to His Chosen

People, the Jews; that He has judged and does judge nations and individuals; that He has made man in His own image and endowed him with freedom of choice to follow or deny God's call; that He has revealed Himself in His only begotten Son, Jesus Christ, who sacrificed Himself on the Cross that all men might through His intercession with the Father know forgiveness of sins and eternal life; that He has revealed Himself through the Holy Spirit, the Body of the Church; that the Church, His Chosen People, is where His Word is spoken and the sacraments administered; that the Church is both the Kingdom of God and the denial of His Kingdom; that Christ will come again on a final day and judge all men and all nations, and all will be perfect in Him; that the Bible is His Word speaking in relevant terms to each age and generation.

In what way does this faith speak to the problems of the lawyer and politician? Before attempting to answer this question, it might be wise to clear up two misconceptions which appear to exist in the minds of many. Firstly, I do not think that the Holy Spirit speaks out concerning the affairs of men and says, "This is the Christian answer" or "This is the right answer." To suggest that God tells the judge who should win a breach of contract case or whether private or public power is the better policy is absurd. Secondly, the Christian lawyer as any other lawyer is under the same obligation to develop his ability to analyze, to do research, to prepare and present his cases with precision, thoroughness, and brilliance. If a lawyer believes that he is serving God's purpose through his work, it is fitting that his work should be in the best tradition of the profession.

To return to the question of relevance, I would suggest that the Christian Faith is relevant to the work of the lawyer and the public servant in that it provides a framework of reference which influences all basic decisions. In terms of the problems which were raised in the first section of this paper, the Christian Faith and the Church are relevant in resolving the tensions resulting from the vicarious character and interstitial role of the lawyer, in the renewal of one's dedication to the practice of law, and in the making of the small but vital decisions concerning law practice.

We have referred to the interstitial role of the lawyer in our society whereby he both belongs to every group of our society and yet is a member of no group. This role gives him a degree of independence and social mobility which only the clergy and the doctor also possess. Yet this role is often sacrificed by the lawyer in order to attain security.

This is indicated by the refusal of some lawyers to be associated with unpopular and controversial issues regardless how meritorious the cause and by the declination of certain cases such as criminal and divorce work. Such an attitude is partly due to the failure of the public to understand the proper function of the lawyer and to the tendency to associate the lawyer with the client, e.g., in Smith Act and espionage cases. However, this attitude is partly due to the desire of the

lawyer not to antagonize some of his clients. This often results in the making of one's decisions almost totally in terms of the wishes of one's client to the detriment of the interstitial role and the vicarious relationship of the lawyer. (Fortunately, there are many eminent members of the bar who have steadfastly resisted such temptations.)

How does any lawyer withstand these temptations and the tension of conflicting loyalties? To live and act responsibly in this type of situation requires tremendous spiritual strength. For the insecure person such a situation is well nigh impossible, and such a person either succumbs completely to one of the pressures or looks to some authority to direct his every move.

One can only suggest that the answer for the Christian lawyer lies in his membership in the Church and his participation in worship with his fellow Christians. There is no salvation apart from the corporate Body of Christ. It is here that the Christian worships God, participates in the sacraments, and hears His Word. As a member of the congregation, he bows down before the one allegiance which has primacy, God the Almighty as revealed through the Lord Jesus Christ. As he listens to the spoken Word, he is not given the answers but is given a framework of reference within which to work. He is not given palliatives to ease his weary soul but God's Word in stern judgment against the inadequacies of his life, conduct, and attitude. As he participates in the sacraments, he confesses his sins before God, repents, and from His forgiveness he takes renewed strength and freedom. This membership and participation in the community of the believers is essential to every Christian in order to know what God calls one to do and in order to draw upon the strength of the congregation to withstand pressures.

We have also stated that the lawyer has a vicarious personality which is essential to his practice of the law. We have referred to the lawyer who remains the pure technician and represents the interests of his client regardless what they may be and to the lawyer who permits his personal views and beliefs to influence his relationship with his client. The former may be amoral. The latter may be ineffective. The lawyer who recognizes the essential function of the vicarious personality will realize that his acceptance of the lawyer-client relationship is voluntary and the identification does not and cannot be complete, for complete identification is to make the client's personality and standards those of the lawyer. Such identification is dangerous.

To sense the true dimensions of his danger, one must have some understanding of the Christian concept of the body. The Christian faith as revealed in the Old Testament has always accepted the Hebraic as opposed to the Greek conception of the body. The Greek division of body into mind, spirit, and flesh is essentially false. The biblical view of man is that flesh, blood, and mind are one and inseparable and that man is one total being. In terms of this concept, one cannot frac-

tionalize one's life, applying a different standard of ethics in each area and assume that the whole is unaffected. The business man who regards his workers as a unit for all purposes also tends to apply in varied degrees the same standard to himself, his friends, and his family. Likewise with the lawyer, the vicarious personality and the true self are part and parcel of the same man. The vicarious personality can in the face of weakness in the lawyer's real self become so dominant that the client's interests become those of the lawyer's real self. If this vicarious personality is to serve this valid purpose of objectivity, it is essential that the true self have a form of stability and commitment. Or, to rephrase the idea, it is essential that the true self control, influence, and mold the vicarious personality. It is inevitable that the two should react on each other, but one must be subordinate.

The dilemma and temptation of this type of experience is not unknown to the Church, for Christ during His life and at the Cross voluntarily identified Himself with a sinful mankind and through His crucifixion took their sins upon Himself. This identification was voluntary, but it was not total. Christ understood through his own flesh and blood the weakness and sinfulness of man, but through his faith in God the Father he was true to the essential Sonship which was in Him. His insight into the need of the dispossessed and disinherited, his ability to identify Himself with them, and yet his strength to withstand the temptation of total identification and remain true to His Sonship — all this from His basic commitment to God the Father.

Likewise the Christian lawyer through his faith is called to understand the voluntary nature of his vicarious relationship, the occasions when he should and should not assume it, depending on the needs of his client and the circumstances of each case, the function which it serves, and the necessity to limit its function because of his commitment as an officer of the court and a trustee of the legal system. Thus, the ideal lawyer is capable both of immersing himself in his client's affairs almost to the point of self-identification, and of drawing back at the proper moment because of the need for objectivity in presenting the case and in serving as an officer of the court. Such ability requires tremendous stability and strength.

Secondly, in the practice of law, the Christian Faith is relevant in terms of the lawyer's rededication of himself to his task. The practice of law can often become a humdrum and monotonous job like any other occupation. The drawing up of wills, the legal research, the preparation of trust and estate matters, the prosecution or defense of a criminal, the preparation of a complicated anti-trust suit — all these matters, however good one's craftsmanship may be, can become monotonous. And with this monotony there is always temptation. Again the participation in the worship of the community of the believers is essential.

Thirdly, in the practice of law, the Christian faith is relevant at the point of the simple but vital decision; and for the young lawyer there are many such decisions. What kind of practice does he wish to have? Will he shun the criminal

and divorce cases because they are unseemly? Where will he locate his practice? In a large or small city firm? In the government? In a corporation? What standard of living does he wish to maintain, and what does this entail? I would suggest that the Church does not tell any lawyer what his decision should be at this point or that any decision is Christian or non-Christian, but it does provide some factors which he should consider in arriving at these decisions.

I have suggested that the Christian Faith is relevant in the practice of law in the resolution of tensions, the rededication of oneself to the law, and the formulation of decisions. Its relevance can be understood only through worship in the congregation, through the repentance and the death which accompanies all prayer, and through the sense of rebirth which accompanies forgiveness. To the "Gentile" and the nominal Christian who seeks peace of mind, this power of worship in the Church and this power of the Holy Spirit to shatter and renew one's being, must remain a mystery. And mystery, stumblingblock, and foolishness it remains until each man accepts his call and understands the meaning of salvation by faith.

At this point we ask how the Christian Faith is relevant to the lawyer and his legal system, and to the legislator and his political system. As stated above, I am quite sure that the Christian Faith tells neither the lawyer nor the judge nor the politician what his decisions should be concerning the simple and complicated legal and political matters with which each deals.

However, the major teachings and doctrines of the Church are relevant to the lawyer and legislator in the formulation of decisions. The doctrines of love, sin, history, and power cannot be ignored, for they are relevant to almost any decision.

Let us consider the doctrine of love. It is axiomatic that God so loved the world that He gave his only begotten Son, Jesus Christ, that the world might be saved. Indeed, if one were to define God, He is Love. And this sacrifice of Jesus Christ means to every Christian that each man is a child of God, loved by God, and equally precious in His sight, and that Christ died for each man.

One indicates love for his fellow man by the fairness with which he treats him and by the degree to which he is willing to listen to him. Legally, this would be called procedural due process, a right guaranteed by the Constitution to every person. In argument before the court concerning the lack of due process, the lawyer, whether Christian or non-Christian, will articulate in legal terminology his concern for the lack of fairness with which a defendant has been treated. Yet, the lawyer's awareness and his raising of the issue and the judge's response to the issue may be due only to the degree of sensitivity which both possess as a result of their attitude towards and conception of the dignity of each man.

Let us consider the doctrine of Sin. The Christian Faith teaches that man through his pride is in continual rebellion against God's will. Men, impelled by

the urge to make themselves little gods, individually and collectively seek security and power at the expense of others. Indeed, men, always painfully aware of their finiteness, seek to extend it into infinity. It is because of this very perverseness in man's nature that law is necessary, necessary to protect the minority from the majority, and equally necessary to protect the former majority, now the minority, from the new majority.

Let us consider the nature of history. The Christian believes that the Kingdom of God is both here and not here. It is here in the world through the presence of the Holy Spirit in the Church, and it is not here in that the world is still ruled by force, violence, and law. The Kingdom will be revealed in its complete fulness in the Second Coming of Christ on the Day of Judgment.

However much one may wince at this statement, it contains a profound significance in terms of the hopes of any Christian. There can never be complete and full justice for the world until the Second Coming. Yet, there can be partial justice. There can be the just solution of many of today's problems, but these solutions will raise new problems and new injustices. The Christian is called to strive for a just solution of today's problems and the ones which will arise tomorrow, but he does not believe that the world gets better and better because of his efforts, and that continual progress, however defined, will bring his salvation. Thus, the Christian can work with both the liberal and the conservative in the solution of any political and economic problem, but he parts company with both at the point at which each defines his expectations and hopes. The Christian, seeing man as made in the image of God, and thus understanding the tremendous part which the legal system can play in laying the foundation for man's redemption, has always hope for man's future; but knowing of man's perversity, and thus never forgetting the necessity for the restraining influence of the law, his hopes for man are always limited.

Let us consider the question of power. In any situation, there is the play of power, whether it be between individuals or nations. As for nations, one must accept the existence of power as a fact, the only question being the exercise of that power. This can be exercised in such a manner as to serve and deny God's purpose, at one and the same time. The Christian Faith cannot say to either the legislator or the diplomat that this exercise is Christian and that unchristian. Before a decision can be arrived at, there is still the need for rigorous analysis. At this point, the doctrines of the Church concerning the role of nations is relevant. The writer would suggest that it is unfortunate that there is such confusion at this point, for many Christians either shy away from the exercise of power and assume that the Second Coming is already here and thus that the world can be ruled not by the balancing of power but by some strange mystical moral order. Here, the Christian is often as much confused as the lawyer who equally assumes that the "Second Coming" is here and that the world can be ruled by some strange legal order. This is not to say

that the questions of morality and law are not relevant in the formation of foreign policy, but they are hardly substitutes for the concept of the balance of power. This tendency on the part of the Christian and the lawyer to deify their own systems and see them as the answers to complicated problems of foreign policy would probably be avoided by a more thorough understanding of the doctrines of the Church.

A lawyer who held the above-stated views would develop certain guideposts in analyzing and trying different types of cases. In criminal cases, regardless how heinous the crime, a defendant has a constitutional right to be treated fairly and as a person. Regardless how honest and upright our law-enforcement officials are (and they are, on the whole, a conscientious and dedicated group), still power does corrupt. The exercise of the government's power has to be scrutinized with great care, and safeguards must be maintained to ensure the protection of the defendant. In drawing up legislation, whether liberal or conservative, a legislator would recognize the will to power of different groups, the tendency to deify the interests of these groups, and the need to surround such groups with checks and balances which would contain their power and interests within legitimate and reasonable limits.

These doctrines of the Christian faith are relevant. There is nothing in the Bible or the teaching of the Church which states that a lawyer must adopt a certain position in a case, or that a legislator must be either a conservative or a liberal, but there is much which requires the Christian as lawyer and legislator to apply the major insights in his analysis of problems. If one were to consider a question such as desegregation, the writer would suggest that few Christians could legitimately disagree with the Supreme Court decision in 1954 which struck down the old interpretation of the equal protection clause, but Christians could easily differ among themselves as to the best method of implementation. At this point, no Christian can avoid a critical and honest analysis which is based on the available research data of the social sciences and which considers the interrelationship of objective, method, and resources.

In many ways, these insights and teachings do limit the Christian as lawyer and legislator. Yet, within these limits there is tremendous freedom. God as creator also speaks to us through the medium of all the disciplines, and the Christian lawyer and legislator has this breadth of knowledge which he can use and analyze, depending on the nature of the problem with which he is wrestling. Another aspect of this freedom is an openness to new ideas and new answers. The Christian who understands the meaning of God's judgment and redemption is always ready to have his present ideas and methods and answers rendered outmoded and to be receptive to new possibilities in every area of life.

To be able to make wise and courageous decisions, to be free and open to new answers, and to understand the relevance of the Christian Faith to one's work is

merely to emphasize both the necessity of a life of worship in the Church and the importance of a study of the biblical faith and the thinking of the Church, ancient and modern. Without this type of discipline we merely become hothouse Christians who wither away in the blast of the world and whose sentimentality and wishy-washy thinking is more a danger than a blessing.

In discussing the objectives of the legal system, the question was asked whether man's justice could be separated from God's love and mercy as revealed through Jesus Christ. For the Christian the answer must be no. Yet, there is still the question how God's love manifests itself in the man-made justice of a system which does not recognize love as an objective.

The answer to this question is an intricate and involved one which is beyond the scope of this writer. However, I would suggest that the Church can be one of the crucial participants in such a manifestation. For example, it is self-evident that there are unconsciously and consciously incorporated into our legal and political systems certain assumptions which are widely held throughout the country. These assumptions exist concerning our political system itself, and concerning topics such as labor unions, the regulation of business, public and private power. The legislative body works on the basis of these assumptions. However, through the workings of many intricate factors, an assumption may be regarded as outmoded. Such a shift in thinking reflects itself in sharp political battles between the two interest groups which are favored by either assumption. Eventually the conflict is resolved. A new or modified assumption is adopted. A new bill is passed. Such a process often takes years.

The same is true concerning the courts. There are often two or three major cases which deal with a particular field of law and lay down the major rationale for an analysis of that area. Future cases then tend to implement and spell out the consequences of the leading cases. However, even here, over a period of time, assumptions become outmoded for various reasons, and eventually the old leading cases are overruled and replaced by other leading cases which incorporate new assumptions. For example, let us consider *Erie v. Tompkins,* which overruled *Swift v. Tyson.* In the latter case, Justice Story assumed that there was a natural law to which the federal common law should conform. During the next century, this assumption of a natural law became outmoded and superseded by a pragmatic approach to the law, articulated ably by Justices Brandeis and Holmes. Once this assumption was undermined, a new assumption grew through the cases and blossomed in *Erie v. Tompkins.* A new line of authority was then established. The writer would not suggest that this was the only factor which brought about *Erie v. Tompkins,* for there were certainly other important policy considerations such as the desirability of uniform results in both the state and federal courts.

Another example is the decision rendered by the Supreme Court in 1954 concerning segregation in public elementary schools. What the court did here,

despite the lack of clear direction concerning the original intent of Congress in enacting the fourteenth amendment, was to declare invalid the former assumption underlying the equal protection clause and replace it with a new assumption. Again, there were many other factors which led to this major decision, but basically the court incorporated a new assumption into the interpretation of this clause.

The only explanation for changes in the legislature and in the courts is a change both in the economic and social conditions of the country. It would be naive to suggest that the Church alone is responsible for this change, whatever its nature, for there are usually many groups which are fighting for the change. However, if the Church has been preaching God's Word and stating what is His judgment concerning the injustices in our society, then the Church has been laying some of the groundwork for the change which a decision or statute incorporates.

There is no simple answer to the question of how God's grace manifests itself in man-made justice. Still, from whatever perspective this problem is approached, the church and its laymen can be vital factors, and the lawyer because of his unique position in our society is probably the crucial layman.

Conclusion

In this paper, I have attempted to suggest the broad outline of the problems of the lawyer in private practice and in public life, and the relevance of the Christian Faith to these problems.

I have suggested that the lawyer faces the personal problem of withstanding the conflicting pressures of private practice and the ideological problem of bringing the teachings of the Church to bear on his analysis and decisions. The only answers which I have been able to formulate are participation in the life of the Church and a deepening of one's understanding of the biblical faith.

In spelling out these answers, I have tried to proceed with caution. I think that the lawyer is inclined to be hostile initially to the Church when it claims to have answers to some of his problems. The lawyer lives at all times in "the world." He is accustomed to the Church which speaks on Sunday morning, but not to the Church which tries to speak to his work as a lawyer. To do this, humility and limited goals on both sides are necessary.

The Christian Lawyer as a Churchman

WILLIAM STRINGFELLOW

In history, the substance of the Christian life is worship. The Christian is a psalmist:

> *Praise the Lord, O my soul, while I live, will I praise the Lord;*
> *Yea, as long as I have any being, I will sing praises unto my God.*[1]

The Christian lives in honor of God:

> *So, whether you eat or drink, or whatever you do, do all to the glory of God.*[2]

"A Christian is constituted by the Eucharist, and the Eucharist by a Christian. Neither avails without the other."[3] That is the testimony of martyrs, but it is as well the common acknowledgment of Christians in the liturgy:

> It is very meet, right, and our bounden duty, that we should at all times, and in all places, give thanks unto thee, O Lord.[4]

Comparative studies of moral theology and legal philosophy are irrelevant if they are isolated from the concrete life of worship. Similarly, the question of the Christian vocation of the practicing lawyer must not be solely an attempt to articulate some ethics to guide a lawyer in his decisions in work. The Christian life is not so much about deciding and doing as it is about being that which Christians are called to be. Precisely, Christians are what they are called to be in worship. Worship is not an ancillary folk activity to which Christians resort out of sentiment or superstition, or even for inspiration or self-motivation. There is no dichotomy between worship and pursuits like studies of jurisprudence and theology or the vocational issue for lawyers. Worship is not isolated from the rest of the Christian life; it is the integration of the whole of the Christian life in history. Worship is not peripheral but decisive in the relationships of Christian faith and secular law.

I. *The Concrete Life of the Church in History*

To speak of the Christian life as worship fixes attention upon the Church as the community called together in history and constituted in worship. There is no

---

Mr. William Stringfellow is Parish Counsel of the East Harlem Protestant Parish, and Counselor to law students for the Church Society of College Work, Protestant Episcopal Church.

---

[1] Psalm 146:1

[2] I Corinthians 10:31

[3] Felix in response to interrogation by the proconsul at Carthage, 304 A.D.; cited by Massey Shepherd, *The Worship of the Church*, Greenwich, Conn., Seabury Press, 1952, p. 5.

[4] *Book of Common Prayer*, The Protestant Episcopal Church in the U.S.A., p. 76.

attention here explicitly to the extra-historical significance of the Church, that is, to eschatology: the concern here is with the Church in history, the Church living in the midst of the world, and with its mode of life. Nor, in speaking presently about the Church in history, is reference made to any notion of the Church as an invisible community, inwardly and secretly uniting Christians throughout the world.[5] At the same time, the visible Church is not meant here as the institutional churches. The Church is, in one sense, the churches seen plainly as secular institutions, but that is not the sense in which the Church in history is now emphasized.

Instead, the Church in history, the living Church as the body in which and from which which the Christian life is constituted, is the congregation, the visible company summoned together in a given place as the worshipping community.[6]

The Church in history, in this sense as the congregation, is the even in which the reconciliation between God and men accomplished in Jesus Christ is already known and celebrated and thereby the message of reconciliation is entrusted for proclamation in all the world and to the whole world.

The Church as Event

Too often Christians nowadays speak carelessly of the Church and thereby make a stupid witness to the world. It is not for the sake of semantic fastidiousness that Christians must speak with responsibility of the Church, but for the sake of the evangelistic trust which is theirs, in other words, for the sake of the world.

The Church evident as the congregation is named "event" to show a difference between a definition of "the idea of church" and an affirmation of that which actually takes place whenever the Church is constituted. This attempt is not to discuss an abstraction but to describe a happening; not to speak theoretically but existentially.[7]

The Church as event is always now and new. The Church comes into being in response to the summons of God in the present moment and place. The response of our fathers is not surety for us. Our own response yesterday is not sufficient also

---

[5] The concept of an invisible Church is a doubtful one since it tends to avoid looking at the visible disunity and impurity of the Church in history and to induce a tranquility toward "the great dangers we are in by our unhappy divisions." Moreover, it often erroneously equates the visible Church with the institutional churches.

[6] Cf. Karl Barth, "The Church—The Living Congregation of the Living Lord Jesus Christ," a paper delivered at the Amsterdam Assembly of the World Council of Churches, published in *Man's Disorder and God's Design*, New York, Harper and Brothers, 1949, pp. 67-76.

[7] Dr. George Florovsky points out that it was only in the late 15th century that systematic doctrine of the Church was composed. "This lack of formal definitions does not mean, however, a confusion of ideas or any obscurity of view. The Fathers did not care so much for the *doctrine* of the Church precisely because the glorious *reality* of the Church was open to their spiritual vision." See his paper, "The Church—Her Nature and Task," in *Man's Disorder and God's Design*, pp. 43-58.

for today. God calls His people now, not now and then. The Church is always new and continually being renewed by God in "the new light and the new power of His Word, according to the testimony of the Bible, the new outpouring of His Spirit, and His new presence in preaching and worship, in Baptism and the Lord's Supper."[8] When the Church is not new, when the Church "degenerates into religiousity," when worship ceases, then in fact the Church has "fallen into the abyss of non-existence."[9]

To consider the Church as an event illuminates the utter dependence of the Church upon God. It is God who maintains all men in history, in fallen creation; it is He who calls the Church into being, it is He who elects the Church, it is He who preserves and renews the Church.

The Church's Knowledge of Reconciliation

The Church as the congregation is the event in which reconciliation between God and men accomplished in Jesus Christ is already known.

1. The Creation Gift — The Church's knowledge of reconciliation is in the first instance a comprehension of the essential character of Creation. Christians know Creation as grace; Creation is, as Luther put it, an act of sheer compassion.

That God, who is wholly sufficient unto Himself, creates everything and everyone, is grace. Grace is the nature and ground of Creation and the essence of the relationship between God and all that He creates and of the relationships amongst all that He creates.[10]

God loves His whole Creation. In particular terms this means that God, in making men, in giving men life, loves them, gives men not only themselves, but Himself. By giving men their being and in giving men Himself, God gives men to each other. In Creation God gives community. The Creation gift to men of life and the common gift to men of God's love enables men to love each other in Him, constitutes mankind, really, as God's community. Moreover, God gives men, in Creation, dominion over the rest of Creation, He gives them a particular relationship to the rest of Creation, He makes the rest of Creation a sign and medium of His love for men.

Creation is grace, and the Creation gift is manifold. The only way men may receive the Creation gift is in the terms of its offer, in love, in freedom, by giving themselves both in their own name and as community and giving all that over which men are given dominion to God.

---

[8] Barth, *loc. cit.*

[9] *ibid.*

[10] *Accord,* Genesis 1.

2. Ruined Creation — The Church's knowledge of reconciliation is this perception of the reality of Creation as grace and also the discernment of the ruin of Creation by sin. Men use the freedom God gives men to love Him to hate Him. Sin is the rejection of the Creation gift utterly: it is the rejection of God himself — *For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good from evil.*[11] It is the rejection of the life God gives men — *Of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat it you shall die.*[12] It is the rejection of community among men — *Cain rose up against his brother Abel, and killed him. Then the Lord said to Cain, "where is Abel your brother?"* He said, *"I do not know; am I my brother's keeper?"*[13] And because it is the rejection of the dominion God offers men over the rest of Creation — *Cursed is the ground because of you; in toil you shall eat of it all the days of your life; thorns and thistles it shall bring forth to you. . . . In the sweat of your face you shall eat bread till you return to the ground, for out of it you were taken; you are dust, and to dust you shall return.*[14]

In Creation the dominion of men means that they acknowledge God's sovereignty; in fallen creation men lose their dominion, suppose they are sovereign, but actually work to death. In Creation men are given enduring community; in ruined creation community is broken and men suffer estrangement which they cannot overcome. In Creation God gives men life; in sin men die.

But men, though in sin they hate God, cannot destroy God's love. In rebellion, God does not forsake men:

> *The man and his wife hid themselves from the presence of the Lord God among the trees of the garden. But the Lord God called to the man, and said to him, "Where are you?"*[15]

Nor is there any place to hide from God:

> *O Lord, thou hast searched me out, and known me. Thou knowest my down-sitting and mine uprising; thou understandest my thoughts long before. . . .*
> *Whither shall I go then from thy Spirit? or whither shall I go then from thy presence?*
> *If I climb up into heaven, thou art there; if I go down to hell, thou art there also.*[16]

This is the magnitude of God's grace: He sustains men even though men hate Him; Creation, which men ruin in sin, remains His.

---

[12] Genesis 2:17
[13] Genesis 4:8-9
[14] Genesis 3:17-20
[15] Genesis 3:8-9
[16] Psalm 139:1, 6-7

3. The Accomplishment of Jesus Christ — The Church's knowledge of reconciliation is that God's grace, which is the foundation of Creation and which sustains ruined creation, overcomes the power of sin in Jesus Christ, once and for all.

The magnitude of God's grace in Creation and in His sustenance of fallen creation makes possible the restoration of Creation, enables the reconciliation of the whole world to God, permits men to be reconciled to God, preserves for men the freedom to love God, and promises God's forgiveness and acceptance. The magnitude of God's grace — and the mystery of His grace — is that it is redemptive.

The power of sin lies in the knowledge of good and evil. Sin is not the violation of divine taboos, nor is it some hereditary predicament which incapacitates men to do that which is good, rather it is the presumption by men that they have the function to *be like God, knowing good and evil.*[17] Sin is the claim under which men make moral distinctions. The final extravagance of this claim is the imagination of men that they will choose the good and bring at last the triumph of good over evil.

Yet even on its face, the human claim to know good and evil is ridiculous. Men apprehend what is good each from his own vantage. What is "good" for you is "evil" for another. What seemed "good" yesterday turns into "evil" today. Both good and evil which men know is subjective — bound to themselves — and transient — bound to history. This remains so as much when men assert their notion of good in the name of God — which in Christian faith is a very great blasphemy — as when they assert some idea of good in their own name.

Moral distinctions originate in the Fall and are fallen, are relative and contradictory, and, finally, come to precisely the same consummation: death.[18] Even if the good men know were absolute, rather than ambiguous, there is no victory for good. The good dies, along with the evil. The moral choices men make do not alter the outcome, do not overcome death.

But what is impossible for men is possible for God.

God's grace transcends moral distinctions. Christians know that Creation is beyond the realm of good and evil and that the categories of good and evil are incomparable and inapplicable to the Creation gift and that God is not bound by men's knowledge of good and evil in fallen creation.

That is why, of course, it is blasphemy for men to make an equation between their idea of good and God — it is really the assertion by men of their own divinity.

In their knowledge of good and evil men seek to overcome sin but cannot do so because the origin of their knowledge itself is sin and the very power of sin

[17] Genesis 3:5
[18] Cf. Genesis 2:17

is their knowledge. So their search for salvation ends in death. But God has the power to overcome death, to break the power of sin, to save men from the enslavement of good and evil.

> And this He has accomplished in Jesus Christ our Lord. *For God so loved the world that he gave his only Son, that whosoever believes in him should not perish but have eternal life.*[19]

In Christ, God is restoring the Creation gift to men:

> Chiefly are we bound to praise Thee for the glorious Resurrection of Thy Son Jesus Christ our Lord: for He is the very Pascal Lamb, which was offered for us, and hath taken away the sin of the world; Who by His death hath destroyed death, and by His rising to life again hath restored to us everlasting life.[20]

In Christ, God is restoring the Creation gift to men:
Christ, God gives Himself to men redemptively. This is the original knowledge of the Church, known to the Church and to none other.

4. Present Knowledge and Final Promise — The Church's knowledge of reconciliation is that which distinguishes the Church from the world, which unites the Church against the world, and which holds for the world the hope for final reconciliation of the whole world to God.

It is the originality of the Church's knowledge that differentiates Christians from other men, that means that the Church is in the world, but not of the world. The gift in Christ, the redemptive gift, is the restoration of life to men, the inauguration of a new life for men even now in the midst of ruined life. *If any one is in Christ, he is a new creation; the old has passed away, behold the new has come.*[21] The new life in Christ makes Christians *aliens and exiles* of the world.[22] And it establishes them in the world as a new community, *a holy nation, God's own people.*[23] Jesus Christ gave Himself for men that *He might redeem us from all iniquity, and purify unto Himself a peculiar people.*[24] That which sets the Church apart, the singularity of the Church's knowledge, is that it is not based upon what men should do to be good, but upon what God has done for all men; it does not originate in moral distinctions, but in the revelation of grace; it is not a splendid normative ethics, but the ethics of redemption.[25]

---

[19] John 3:16
[20] *Book of Common Prayer*, p. 78.
[21] II Corinthians 5:17
[22] I Peter 2:11
[23] I Peter 2:9
[24] Titus 2:14
[25] That is why the Gospel is really incomparable to moralistic and legalistic religions. For whatever appears as common ground between the Christian faith and the religions is far less important than that which distinguishes them. For that matter, it is the originality of the

The knowledge of reconciliation unites the Church against the world. It is the truly radical substance of the Christian faith; it is the radical fact about the Church. In its plainest terms, the Gospel is radical — and disliked — because it admits that the significance of history, *per se,* is death. The news of reconciliation is that the power of sin, which is exercised in men's attempt to know good and evil, is broken. The ethics of the world rest upon the distinction of good and evil and within that scope the first are first and the last are last. The Gospel overturns the ethics of the world. *So the last will be first, and the first last.*[26]. The Gospel stands against both what men suppose is good, as well as what men condemn as evil. The Church's knowledge is that the world is overcome:

> *I have said this to you, that in me you may have peace. In the world you have tribulation; but be of good cheer. I have overcome the world.*[27]

The Gospel threatens all that men do and all that men decide. The Gospel is Judgment upon all. At the same time, the Gospel shatters men as they judge each other. *He that is without sin among you let him first cast a stone at her.*[28] Yet this does not make the Gospel bad news for any man, for God's Judgment of all men is also His Mercy for all men.

The Church's knowledge of reconciliation holds for the world the hope for its final reconciliation. The Gospel is good news for all the world. It is good news that the judgments of men are confounded by the Gospel, and that the Judgment of God is as well on the pharisee as the harlot.[29] It is literally Gospel that, though men are impotent to overcome sin, God has that power and in Jesus Christ has used it to justify every man, the circumcised and the uncircumcised.[30] All the hopes of men, born of their knowledge of good and evil, are vain, but in Christ men have a hope which is not vain. In Christ men have a lively hope, a complete hope, a final hope of being restored to God, of reconciliation to God, which is to say, of eternal life. This is the hope known in the Church:

> *Blessed be the God and Father of our Lord Jesus Christ! By His great mercy we have been born anew to a living hope through the resurrection of Jesus Christ from the dead.*[31]

And this is the hope, the message, entrusted to the Church for the world:

All this is from God, who through Christ reconciled us to Himself and gave

---

Church's knowledge that makes the presentation of Christianity as positive thinking arrogant heresy. The Gospel sets the Church apart from the world, while positive thinking is an advocacy of successful conformance to the world.

[26] Matthew 20:16
[27] John 16:33
[28] John 8:7
[29] Cf. Matthew 21:31
[30] Cf. Romans 3:29-30
[31] I Peter 1:3

us the ministry of reconciliation; that is God was in Christ reconciling the world unto Himself . . . and entrusting to us the message of reconciliation.[32]

Now the Christian hope is not vain because God has indeed overcome the power of sin. *In fact Christ has been raised from the dead.*[33] The Church knows reconciliation already and is therefore confident in proclaiming the message of reconcilation to the world. Yet the Church's experience of reconciliation is but the fore-knowledge of the reconciliation of the whole creation to God. The Church is the herald of that which is to come. The Church's present knowledge of and life in reconciliation is for the world the evidence and promise of its final reconciliation.

For as in Adam all die, so also in Christ shall all be made alive. But each in his own order: Christ the first fruits, then at His coming those who belong to Christ. Then comes the end, when He delivers the Kingdom to God the Father after destroying every rule and every authority and power.[34]

Bluntly, the hope of the world, which is the Gospel, which is the message of the Church, is that the world end. That is why the task of the Church is evangelism, the calling of the world into the Church, and that is why the forsaking of evangelism, the conformity of the Church to the world, is apostasy. And because the Gospel is true hope, because the knowledge of reconciliation is good news, it is celebrated in the Church.

The Celebration of the Gospel

The Church as the congregation is the event in which reconciliation between God and men accomplished in Jesus Christ is already known and celebrated.

1. Celebration as the Church's Deed — The celebration of the Gospel in the Church is, in one sense, simply the characteristic act which the Church does in the world. The Church engages in observances and rites: the Church initiates a new member, the Church gathers for the Lord's Supper, the Church reads the Bible, the Church listens to the preacher. In these customary ways, the Church recalls the Gospel, celebrates in remembrance of what God has done in Jesus Christ. In a like way, the Church celebrates in anticipation of the promise of the Gospel of final reconciliation of the whole creation to God, celebrates, as heirs do, the inheritance promised in Christ.[36]

But the Church does not just celebrate a sure inheritance nor merely celebrate the memory of the Lord; the Church celebrates the reconciliation known now, God's

[32] II Corinthians 5:18-19
[33] I Corinthians 15:20
[34] I Corinthians 15:22-24
[35] Psalm 45:17
[36] Cf. Hebrews 9:15, and see *Book of Common Prayer*, p. 276.

gift of Himself to the Church, the presence of the Holy Spirit which makes the Church always now and new.

2. Celebration as the Church's Being — The Church's celebration of the Gospel is the celebration of the presence of God with His people. The celebration of the Gospel is the event of reconciliation already taking place in the midst of history.

> *I will pray the Father, and He will give you another Counselor, to be with you forever, even the Spirit of truth, whom the world cannot receive, because it neither sees Him nor knows Him; you know Him, for he dwells with you, and will be in you.*[37]

The Church is constituted wherever and whenever God dwells with His people and His people are filled with the Holy Spirit. Wherever and whenever this event takes place the Gospel is celebrated truly, concretely, originally, immediately.

Celebration as the Church's being, as the Church's very life, indicates the fuller meaning of celebration, beyond remembrance and anticipation, as worship of the living God, whose presence is known to the worshipper. It is the reality of the celebration of the Gospel existentially for the Church which saves the Church from idolatry. By the same token, where the Gospel is not celebrated as the very event of being the Church, the Church is scandalized and broken in idolatry. Moreover, where worship is the celebration of the event of the Church, celebration of this Gospel event, it is saved from being mere rite and ceremony.

> *Christ, our pascal Lamb, has been sacrificed. Let us, therefore celebrate the festival.*[38]

3. Celebration in the Common Sacraments — Christian worship, the Gospel celebration, is never an abstract contemplation of God's navel, but always utter existential involvement. Worship is not a general affirmative attitude toward God, but a specific historic event in which the worshipper participates in a total way. And while the worship of God is and ought to be manifold, it is never really a formless or ethereal matter.

Christians have a simple responsibility to their fellow members in Christ to maintain in the forms of their worship an integrity to the Gospel. This is in itself a sufficient reason for Christians to continue and uphold forms of worship which are the common sacraments of the Christian life, that is, Baptism, Holy Communion, and the Preaching of the Word in the congregation.[39]

[37] John 14:16-17

[38] I Corinthians 5:7-8

[39] Though the Preaching of the Word of God in the congregation is to be distinguished from the sacraments of Baptism and Holy Communion, I understand it to be integral to these sacraments and that it is generally necessary for the health of the Church that Preaching be done when the sacraments are celebrated and that the sacraments be celebrated where preaching is done.

But there are far more cogent reasons to regard these sacraments especially. Primarily each has a foundation in the life of the Church through the ages and in the Bible and in the ministry of Christ Himself. The sacraments of Baptism and the Lord's Supper "ordained of Christ be not only badges or tokens of Christian men's profession, but rather they be certain sure witnesses, and effectual signs of grace, and God's good will toward us," while "Holy Scriptures containeth all things necessary to salvation."[40]

It is Christ who commissions His disciples:

> *Go into all the world and preach the Gospel to the whole creation. He who believes and is baptized will be saved.*[41]

And it is Christ who makes the Supper a sacrament:

> *As they were eating, Jesus took bread, and blessed, and broke it, and gave it to the disciples and said, "Take, eat; this is my body." And he took the cup, and when he had given thanks he gave it to them saying, "Drink of it, all of you; for this is my blood of the covenant, which is poured out for many for the forgiveness of sins."*[42]

The celebration of the Gospel in the common sacraments is not just recollection, nor only expectation, and mark that the celebration in the sacraments has no part whatever of the practice of occultism. The Mass is not magic. The warning of Paul to the Church in Corinth is meet for all Christians:

> *Therefore, my beloved, shun the worship of idols. I speak as to sensible men; judge for yourself what I say. The cup of blessing which we bless, is it not a participation in the blood of Christ? The bread which we break, is it not a participation in the body of Christ? Because there is one loaf, we who are many are one body, for we all partake of the same loaf. Consider the practice of Israel; are not those who eat the sacrifices partners in the altar? What do I imply then? That food offered to idols is anything, or that an idol is anything? No, I imply that what pagans sacrifice they offer to demons and not to God. I do not want you to be partners with demons. You cannot drink the cup of the Lord and the cup of demons. You cannot partake of the table of the Lord and the table of demons.*[43]

There is no celebration of the Gospel where a sacrament is perverted into necromancy; there is, indeed, where and when worship is idolatrous, such an ignorance of the Gospel and of its power that the Church dies immediately.[44]

[40] Art. XXV, Art. VI, Articles of Religion of the Protestant Episcopal Church.
[41] Mark 16:15-16; cf. Matthew 28:18-20
[42] Matthew 26:26-29; see I Corinthians 10:14-17
[43] I Corinthians 10:14-21
[44] Of course part of this whole problem for the Church is that some forms of hocus pocus have become so common that the danger of idolatry is ignored. For examples, consider the use,

Because idolatry is a constant peril, because the celebration of the Gospel is more than remembrance and preview, because of the venerability of the common sacraments, because any authentic celebration of the Gospel is informed through these sacraments, it is imperative to be concrete, to speak plainly of what happens in the Gospel celebration in the common sacraments. It suits the economy of this essay to discuss with particularity — just illustratively, not exhaustively — only the sacrament of Holy Communion, but, in principle, what is affirmed about the Lord's Supper can as well be said of Holy Baptism and of the Preaching of the Word of God in the congregation.

The celebration of the Gospel in the Supper of the Lord is a thanksgiving — *eucharistia* — to God for the Gospel:

> Almighty and everlasting God, we most heartily thank thee, for that thou dost vouchsafe to feed us who have duly received these holy mysteries . . . and dost assure us thereby of thy favour and goodness toward us; and that we are very members incorporate in the mystical body of thy Son, which is the blessed company of all faithful people; and are also heirs through hope of thy everlasting kingdom, by the merits of his most precious death and passion.[45]

The Eucharist is the acknowledgment of who God is and of what God has done for men; the Eucharist glorifies God, to be most concrete about it, because *He is God:*

> We praise thee, we bless thee, we worship thee, we glorify thee, we give thanks to thee for thy great glory, O Lord God, heavenly King.[46]

In giving thanks and praise to God, the congregation is identified not only with the whole Church —"the blessed company of all faithful people"— but with the whole of creation. For though creation is ruined, it is sustained by God in ruin, and in spite of its ruin it points to God. For Jesus, upon His entry into Jerusalem, was told by the Pharisees to rebuke His disciples for celebrating Him, but He answered: *I tell you, if these were silent, the very stones would cry out.*[47] The power of sin is more a trespass than a taking.

Though men hate God, when they come unto themselves, they praise Him; the response to God's reconciling initiative is thanksgiving. This the Church knows and

---

superstitiously, of Christian symbols—medals and mustard seed remembrancers—as good luck charms. Or consider the use of fragments of Scripture for a kind of daily horoscope. More serious is the peril of idolatry where peoples, grossly ignorant of the Gospel, are lightly invited by the Church to participate in sacramental worship. As the reference to Paul above indicates, the danger in this matter is literally sorcery, that is, the use of demonic power.

[45] *Book of Common Prayer*, p. 74.

[46] *ibid.*

[47] Luke 19:40

celebrates in its own name, but also in representation the Church gives "thanks for all men."[48]

The Church's celebration of the Gospel in the Eucharist is therefore intercessory. The congregation gives thanks for itself, for the whole Church, and in behalf of all men, in behalf of the whole world. The Church intercedes in thanksgiving and in petition. The congregation praises God and beseeches Him for the whole Church,

> to inspire continually the Universal Church with the spirit of truth, unity, and concord; And grant that all those who confess thy holy Name may agree in the truth of thy Holy Word, and live in unity and godly love.[49]

In the congregation, Christians intercede for each other:

> And to all thy People give thy heavenly grace; and especially to this congregation here present; that, with meek hearts and due reverence, they may hear, and receive thy holy Word; truly serving thee in holiness and righteousness all the days of their life.[50]

And the congregation bears through intercession the burdens of other men:

> And we most humbly beseech thee, of thy goodness, O Lord, to comfort and succour all those who, in this transitory life, are in trouble, sorrow, need, sickness, or any other adversity.[51]

Now the celebration of the Gospel in intercession is not sentimental identification with those in need, but solemn reliance upon the grace of God. For the Church receives and knows His grace, the congregation gathers in response to His grace, and therefore has the freedom to intercede, that is, to stand before God in willingness to accept the burden of another, to take the place of another in need. The Church dares to take on the affliction and suffering of the world because it knows that God's love endures. The congregation intercedes because God is faithful. When the Church petitions it is, with very great clarity, the body of Christ. For Christ has made for the whole world the consummate intercession: *If any man sin, we have an Advocate with the Father, Jesus Christ the righteous; and He is the Propitiation for our sins.*[52]

Intercession, therefore, has nothing to do with persuading God to do what men would like to do; it has no part either of self-inducement, bolstering men to do what they want to do. Intercession has nothing to do with men's will for themselves, but only to do with God's will for the world. *Nevertheless, not my will, but thine, be done.*[53] Intercession is the freedom of Christians to suffer with and for

[48] *Book of Common Prayer*, p. 74.
[49] *ibid.*
[50] *ibid.*
[51] *ibid.*
[52] I John 2:1-2
[53] Luke 22:42

others as a witness to the world that in His suffering for the world, God has overcome suffering. Intercession is a celebration of this good news for the world, which is, at the same time, of course, God's will for the world.

Because intercession in the Eucharist is in the end a petition that God's will be done, it is the acknowledgment by the congregation of their identity as men, subject, as other men, to the power of sin. Christians acknowledge God in thanksgiving, they acknowledge themselves in penitence. Contrition is integral to the celebration of the Gospel. Christians are exhorted, advisedly, before they participate in the Holy Communion:

> Dearly beloved in the Lord, ye who mind to come to the holy Communion of the Body and Blood of our Saviour Christ, must consider how Saint Paul exhorteth all persons diligently to try and examine themselves, before they presume to eat of that Bread, and drink of that Cup. For as the benefit is great, if with a true penitent heart and lively faith we receive that holy Sacrament; so is the danger great, if we receive the same unworthily.[54]

Penitence is not however an act which earns for Christians a place at the Supper of the Lord. Rather penitence is a dimension of love for God. "Cleanse the thoughts of our hearts by the inspiration of thy Holy Spirit, that we may perfectly love thee."[55] The perfection of love of God by men is not the achievement of some standard of merit demanded by God, but the wholeness, the completeness of our gift of ourselves and all that we are as men and as sinners to Him.

> We acknowledge and bewail our manifold sins and wickedness, Which we, from time to time, most grievously have committed, By thought, word, and deed, Against thy Divine Majesty, Provoking most justly thy wrath and indignation against us. We do earnestly repent, And are heartily sorry for these our misdoings; The remembrance of them is grievous unto us; The burden of them is intolerable.[56]

Repentance is involved in the wholeness of surrender to God, in perfectly loving Him, and it is reliance upon the fullness of His love, upon the sufficiency of His love in expitating sin.

> We do not presume to come to this thy Table, O merciful Lord, trusting in our own righteousness, but in thy manifold and great mercies. We are not worthy so much as to gather up the crumbs under thy Table. But thou art the same Lord, whose property is always to have mercy: Grant us therefore, gracious Lord, so to eat the flesh of thy dear Son Jesus Christ, and to drink his blood, that our sinful bodies may be made clean by his

---

[54] *Book of Common Prayer*, p. 85.
[56] *ibid.*, p. 82.
[55] *ibid.*, p. 67.

body, and our souls washed through his most precious blood, and that we may evermore dwell in him, and he in us.[57]

Now the Supper of the Lord takes place, the Gospel is celebrated, the Church in the congregation is alive. The congregation comes to the Lord in praise and thanksgiving, in intercession and petition, in penitence and contrition. The congregation gathers in acknowledgment of God, and in the real experience also of the power of sin, and in the sure knowledge that God in Jesus Christ gives Himself to men redemptively.

The celebration of the Gospel in the Holy Communion is the oblation of the congregation, the offering to God, in the only full and appropriate response men can make to His redemptive gift, of all that He first gave men: these elements of bread and wine and these alms, in evidence of God's gift to men of dominion over the rest of Creation; this people gathered, this congregation, this *Holy Communion,* in testimony of God's gift to men of community; and "our selves, our souls and bodies," which is God's gift of life to each man. Everything is given to God: everything which He first has given men. This is the oblation of the congregation in the Lord's Supper. This is the celebration of the Gospel, for now *the very event* is taking place in the midst of history: God reconciling men to Himself; God is with His people and His people worship Him; thereby the message of reconciliation is proclaimed for all the world.

The Proclamation of the Gospel

The Church as the congregation is the event in which reconciliation between God and men accomplished in Jesus Christ is already known and celebrated and thereby the message of reconciliation is entrusted for proclamation in all the world and to the whole world.

1. Celebration of the Gospel as Proclamation of the Gospel — The most lucid and cogent witness of God's love for men is that through Jesus Christ He gives men a new life now, in the very midst of the old life, that the new life begins in history in His Church and in the faith of His Church, that men are born anew in His Church, that in His Church the new life is celebrated. The message of reconciliation for the world is entrusted to the Church by the event of reconciliation which constitutes the Church and which the Church celebrates. The Gospel is entrusted to the Church, the Church possesses the Gospel, but the Church is not possessive about the Gospel, for the Gospel does not mean that God loves the Church, the Gospel means that God loves the world and therefore elects the Church. Hence nothing is more demonstrative of the Gospel in the world and to the world than the concrete life of the Church in history. That is why it is always a very great tragedy for the world when the actual life of the Church is not a celebration of the

[57] *ibid.*, p. 82.

Gospel but a conformation to the world. Where apostasy or heresy or sorcery are celebrated, the Gospel is not proclaimed. But where the celebration has integrity in the Gospel, it is integral to the Gospel, and celebration is proclamation.

2. The Proclamation of the Congregation — The celebration of the Gospel in sacramental worship is the proclamation of the Gospel:

> *The nations will know that I am the Lord, says the Lord God, when through you I vindicate my holiness before their eyes. For I will take you from the nations and gather you from all countries, and bring you into your own land. . . . You shall dwell in the land which I gave to your fathers; and you shall be my people, and I will be your God.*[58]

When the congregation worships God, God is vindicated before all men; the world may see who God is and believe what God has done in Jesus Christ.

In a rather exact way in the Lord's Supper God prepares a table for His people in the presence of their enemies.[59] In the Holy Communion the new community in Christ, the Christian society, is evident in history as over against all other nations and all the societies men make, as a witness that the true hope for community is in Christ:

> *You are a chosen race, a royal priesthood, a holy nation, God's own people, that you may declare the wonderful deeds of Him who called you out of darkness into his marvelous light.*[60]

The oblation of the congregation is a witness also to the world that men have usurped and perverted the dominion which God gave men in Creation but that nevertheless the whole world belongs to God. "O all ye Works of the Lord, bless ye the Lord: praise Him and magnify Him forever."[61]

The proclamation of the Gospel by the congregation is the very celebration of the Gospel in the congregation itself.[62]

3. Proclamation in Dispersion — Christians live in the world and bear the message of reconciliation to the world, not only as the congregation gathered in the midst of the world but also in dispersion, scattered in the world, taking part in the

---

[58] Ezekiel 36:23-28

[59] Cf. Psalm 23:5

[60] I Peter 2:9

[61] *Book of Common Prayer*, p. 11.

[62] Liturgy which is based upon Scripture, I suggest, is more secure both as celebration and proclamation of the Gospel than innovation contrived by individual ministers. In the latter practice the peril is great that the basis of public worship will be the predilections and personality of the preacher. But where the liturgy is primarily wrought from Scripture its use is a manner of preaching and proclaiming the Word of God, the priest and his predilections notwithstanding.

life and work of the world. This is the experience of every Christian, as much for the priest as for the layman.[63]

When the congregation is dispersed, when Christians go out from the congregation into the world and into the work of the world, the conflict between the Church and the World becomes very explicit, and, so to speak, personalized. A Christian in the world lives in the tension between Church and World, between grace and law, between Christ and Caesar, between salvation and sin, between life and death, between worship and work.

Now it does not at all mitigate this inherent tension of the Christian life to identify it with the tension of good and evil. For the conflict between good and evil is one known to all men in sin, and it is known to Christians in that same sense and is but one side of the struggle within the Christian life. The tension of the Gospel is between grace, on the one hand, and what men know as good and evil, on the other. It is the tension between grace and law, not just between grace and bad law.

Nor does it make any sense in dealing with this tension to say that Christians must do their work in the world in a transforming way, in a way which witnesses to the Gospel, when at the same time it is said that the congregations are poor in their witness and spend their time complacently in worship services instead of in action in the world. For Christian action in the world is void in the inception where it is cut off from the informing support of the celebration and proclamation of the Gospel in the congregation. In reality, the Christian bears the tension between Gospel and world — and bears it effectively in radical and transforming witness only because of his participation in the concrete life of the Church in history, only because he participates in the event of the congregation.

> The congregation is the event in which the Sacraments are powerful as the one reality by which men live: Baptism, which incorporates human beings into this special relation to Jesus Christ, and the Lord's Supper, which keeps them in this state of grace, that is, of "belonging to Him," and *enables* them to fulfill their mission to others.[64]

Apparently a Christian works in the world just as any man does. He has some job as a lawyer or laundryman, teacher or teller. He relates himself to the material of his work and to those with whom he works and those for whom he works and those against whom he works. But the Gospel makes this difference: a Christian knows that sin has ruined men's relationship with the rest of Creation. The Christian

---

[63] I have in mind that the office and function of the priest is in the administration of the sacraments and the nurture of the congregations. All the manifold activities in which the ordained indulge which are not essential to this office are, in principle, secular occupations of the clergy. It is a very grave matter nowadays that many clergy are occupied in activities which entirely or substantially omit the exercise of their office in administration of sacraments and nurture of congregations.

[64] Barth, *op. cit.;* emphasis mine.

knows that men have lost their dominion over the rest of Creation and that in its place is toil, pain, sweat, transience, death.[65] In short, the Christian realizes that the non-Christian appropriates the material of his work, the things of the world, only for death; the non-Christian in his daily work is, precisely, working to death.

But the Christian, in his daily work, is no more a slave to death. Christ has set Him free. He is free to appropriate the material of his work to worship God, to glorify God, to offer to God. A Christian in his daily work is free to celebrate the Gospel in quite the way in which he gathers with other Christians as a congregation to celebrate the Gospel, that is, sacramentally, by offering himself, which includes his work, to God. His oblation in work, like his participation in the oblation of the congregation, is manifold: it is his acknowledgment of God in thanksgiving and his acknowledgment of himself in penitence, and it is his intercession — his freedom to share the burdens of his fellow workers or clients or employers or competitors. His work is a celebration and a proclamation of the Gospel to the world.

But moreover, a Christian is free in his knowledge of the love of God for the world to love those whom he encounters in his daily work. The love of a Christian for a non-Christian is informed, too, in sacramental worship, that is, it is in behalf not only of ourselves or the Church but also in behalf of the whole world and particular men. The love of a Christian for a non-Christian is not a love of man for himself but for his sake. This is love for him in the Gospel because of what God has done for him. A Christian loves another, gives himself to another, because Christ has been given for both. A Christian loves him in this way, in a way which celebrates the Gospel, in a way which proclaims the Gospel. A Christian loves him that he may be evangelized.

But let it be plain, work cannot be sacramentalized, men cannot be evangelized, the reality of worship cannot permeate the life of Christians dispersed in the world, except out of the faithful gathering of Christians as the congregation for sacramental worship. For the celebration and proclamation in the event of the congregation is that which makes possible and relevant and powerful the celebration and proclamation of the Gospel in any other circumstance in history.

The substance of the Christian life in history is worship.

II. *The Gospel, Secular Law, and the Christian Lawyer*

When the Gospel is taken seriously, the decisive issue between theology and jurisprudence and the central vocational problem of a lawyer who is a Christian is the tension between grace and law.

The Christian life in history, which is in substance, both in the congregation and for Christians in dispersion, the life of worship, is only intelligible as response to and reliance upon the grace of God. But at the same time the congregation and

[65] See Genesis 3:17-20

Christians in dispersion are subject to secular law. Christians are of the Church, but in the world.

This struggle between the Church and the world, as seen in the tension between grace and law, is represented particularly in the Bible in the trial of Jesus before Pilate.[66] It is the passionate concern of St. Paul and is alluded to in the first Epistle of St. Peter.[67] Later, by mediaeval scholastics it is dealt with in the formulation of natural law in Christian moral theology, and subsequently it was a Reformation issue, a concern for Luther, Calvin, and Hooker. In the contemporary Church, the tension between grace and law remains the substantive issue of Christian social ethics.

For some Christians the tension between grace and law, between justification and justice, seems resolved by the postulate of natural law understood as a measure of the righteousness God demands of men and, therefore, as a standard for positive law.[68]

For other Christians, the tension remains, but they find decisional norms for positive law in the purpose of the Gospel, without a stated postulate of natural law and frequently with a certain association with positivist criticism of natural law.[69]

---

[66] John 19:10-11; cf. also Matthew 22:17-21, Mark 12:13-17, Luke 20:20-26.

[67] Cf. esp. Romans 13:1-8; I Peter 2:13, 17. Some of the biblical discussion of law concerns, of course, the law of ceremonies and religious rites of Israel, as distinguished from either positive law or the moral commandments. This kind of law, regulating conduct of those subject to it, is an equivalent of positive law, and the biblical material dealing therewith is relevant to the problem of grace and secular law. See Mark 2:27, Matthew 12:1-8, Luke 6:1-6; Matthew 9:14-15, Mark 2:8-20; Matthew 15:1-20, Mark 7:1-23, Luke 5:33-39. The conversion of Gentiles raised this issue of the Gospel and the religious laws of Israel in the early Church. See Acts 11:1-8, Acts 15:1-32, Galatians 2:1-10. Much of the other biblical reference to law is concerned, however, with neither positive law nor religious laws, but with moral commandments. Exodus 20-23, Deuteronomy 5, Leviticus 19; Israel was a people under the law and their faithfulness to God was their obedience to the commandments. Exodus 19, cf. Genesis 9. Christians are heirs to Israel and to the moral commandments, but this does not mean that Christians adopt the understanding of Israel of the moral commandments. For God has now revealed Himself in Jesus Christ. Therefore Christians regard the moral commandments under the impact of the Gospel. For Christians the commandments and the Gospel are not considered separately, and they ought not to be, as in homilies they often are, taken as interchangeable. In the New Covenant, the commandments are given extraordinarily new dimensions by Jesus. Matthew 5:21-48. Jesus identifies Himself, not as a teacher of the moral law, but with God, from whom Israel received the commandments. Jesus claims that the Law is fulfilled in Him. Matthew 5:17; Luke 16:16-17; Romans 10:4. Grace is called the summation of the law. Matthew 22:34-40; Mark 12:28-34; cf. Romans 13:10. The tension of law and grace in the contrast between the religion of Israel, where men are justified by obedience to the law, and the Gospel, where *man is justified by faith in Christ and not by works of the law*, is a constant emphasis of St. Paul. Galatians 2:16; cf. Romans 3:20-28; 5:2-3; 6:14.

[68] Among contemporary theologians and lawyers, for example, Jacques Maritain, Emil Brunner, Alec Vidler, Amos Wilder, Wilbur Katz.

[69] As Reinhold Niebuhr, Kenneth Underwood, James Pike, Harry Jones, Samuel Stumpf.

But for some Christians grace and law are understood in more extreme tension. For them moral legalism is transcended by the decisive revelation of grace in Jesus Christ and natural law, therefore, represents a reversion to pre-Christian morality, and any decisional ethics really imitate this reversion. The tension of grace and law is not resolved by construing grace in moral and legal terms. Grace is not a norm, but an act. The Gospel is not law, but gift. "Christian faith is the revelation of grace and Christian ethics is the ethics of redemption and not of law."[70]

Natural Law as a Christian Jurisprudence

There is an original opposition between natural law and Christian faith which resides in "the most general and abstract precept of the Natural Law . . . that good is to be done and evil avoided."[71] This notion, which has been very consistently characteristic of the natural law system, rests upon the idea of the good as the aim of human life.[72] But the Gospel does not rest at all upon this concept, but upon the event of Jesus Christ and Christ is not some concept but the Person in whom Christians know the living God.

1. Natural Law and the Fall — This opposition of natural law to the Gospel is disclosed in other terms, especially, where a conscious effort has been made to reconcile the natural law theory with the Gospel. Thus a significant mutation of the classical conception of natural law by Christians who accept natural law has been the emphasis upon the provisional character of human perception of the law of nature because of sin. "Man's capacity for discerning (natural Law) has been weakened by the Fall."[73] Human knowledge of the terms of the good life is limited by sin.

But the biblical characterization of sin is the very pretension of men that they may have the knowledge of good and evil.[74] Indeed, the natural lawyers invert the biblical comprehension of sin in order to accommodate the intrinsic necessities of the natural law hypothesis. The natural lawyers treat too lightly the Gospel, for if sin is just moral deficiency, then grace and natural law amount to the same thing, that is, the final corrective of moral deficiency, and men need not look for their salvation to Jesus Christ our Lord but may as well look to Sophocles.

2. Natural Law and Eschatology — The natural lawyers, importing into Christian faith the idea of the good which can be ascertained by men, even though

---

[70] Nicolas Berdyaev, *The Destiny of Man*, New York, Scribner's, 1937, pp. 85-86. I would identify Berdyaev only partially with this group. Karl Barth and Jacques Ellul are the only others in my knowledge, among contemporary writers, who take seriously the extremity of the tension between grace and law.

[71] Alec Vidler, *et al, Natural Law: A Christian Reconsideration*, London, SCM Press, 1946, p. 21; cf. Thomas Aquinas, *Summa Theologica, Prima Secundae*, Q. XCIV, A. 2

[72] Cf. Walter Lippmann, *The Public Philosophy*, Boston, Little, Brown, and Co., 1955.

[73] Vidler, *op. cit.*, p. 25.

[74] Genesis 3:5.

only provisionally, have had also to reconstruct their doctrine of the fulfillment of all things. Natural law eschatology makes the consummation of history dependent upon man's cooperation with God through perception of the law of nature and "voluntary affirmation of it in right conduct."[75] And though in this interpretation there is an insistance that a true discernment of natural law 'will commonly be perceived only in the light of the Biblical revelation," nevertheless, " the products of obedience to Natural Law. . . . [are] used by God in preparing the ground for the establishing of His kingly rule."[76]

This is no justification by faith rather than by works of the law, no divine justification, no understanding that men do not overcome the power of sin — even a little bit — nor earn their own salvation by obedience to law It rather makes God's grace contingent upon men.[77] Christian eschatology affirms that God, in whom all things were made and by whom even fallen creation is sustained, is the one in whom all is consummated.[78] The Christian hope looks to God's power and His righteousness, and not to the works of men or the justice men make, even in the name of the law of nature.

3. Natural Law as Conformance to the World — Human justice is not a substitute for divine justification, nor is it even a corollary in preparation for the consummation of history. But the natural law advocates have tried to make the law of nature the normative ethics for men's historical life. "The Natural Law is a rule or measure of the righteousness which God demands from His human creatures."[79]

> Natural law is the sum, in order, of the inclinations, tendencies, appetites, what you will, which guide or direct (man) to his proper perfection and his natural end.[80]

But it is impossible to understand the Gospel as just a version of the good life in this world which must be met as a condition precedent to the fulfillment of all things.

> The chief argument that the world has always brought against the Gospel is that it is impracticable and opposed to the very laws of life. And indeed the morality of the Gospel is paradoxical and contrary to the morality of our world even at its highest. The Gospel is opposed not only to evil but to what men consider good. Usually people have tried to make the Gospel fit the requirements of this world and so make it acceptable. But this has always meant a distortion of Christianity.[81]

---

[75] Vidler, *op. cit.*, p. 21

[76] *ibid.*, pp. 24, 25.

[77] Cf. Romans 3:20-28.

[78] Cf. *Christ—The Hope of the World: Report of the Advisory Commission on the Main Theme of the Second Assembly of the World Council of Churches,* New York, Harper and brothers, 1954, pp. 9-13.

[79] Vidler, *op. cit.*, p. 19.

[80] *ibid.*, p. 37.

[81] Berdyaev, *op. cit.*, p. 123.

The importation of natural law into Christianity is a reversion to pre-Christian moral legalism, and it is a resolution of the tension between grace and law only in the sense that it denies the need for and the reality and power of grace. Natural law, for the Church, is conformance to the world.

Positivism, Natural Law and the Gospel

The absolute tension between grace and law is also disclosed in the opposition of the Gospel to legal positivism. Positivism professes an independence from moral precept, from some particular idea of good, as a standard for positive law. But this is no abstention from moral decision, it is a change of timing. In natural law, moral distinctions are made prior to enactment, and a law, once enacted, may be called good or evil. In positivism, moral distinction arises in the enactment, after which, whatever the law enacted, it may be called good. Again, it is a change in nomenclature. That law which natural law may call evil, positivism calls good, so long as it remains law. Moral distinctions are integral in both positivism and natural law, but the Gospel opposes the moralities of the world because they have no saving power. Moreover, positivism is quite as objectionable as natural law as a doctrine of self-justification. In proper law-making, positivism equates law with justice, that is, positive law is wholly validated in terms of itself. Any activity of God in this scheme is not only unnecessary and irrelevant, but practically impertinent. Positivism, in short, admits its own opposition to the Gospel.

1. The Antagonism Between Positivism and Natural Law — A frequent complaint from the positivists is that the resort to natural law as a standard for positive law is in fact recourse to subjectivism. In *Adamson v. California,* where the Court relied upon natural law for a definition of due process of law, Justice Black,, in his dissent said:

> I fear the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights.[82]

This is an accusation remininiscent of Jeremy Bentham: "They do not see that these natural laws are laws of their own invention."[83]

In such criticism of natural law, when it is invoked as a standard for positive law, the positivists apprehend more than they know, for surely in the Gospel is exposed the essential subjectivity of men's knowledge of good and evil.[84]

---

[82] 332 US 46, 89; 67 Sup Ct 1672, 1695 (1947)

[83] Jeremy Bentham, *Theory of Legislation,* New York, Harcourt, Brace & Co., 1931, Ch. XIII.

[84] Curiously enough the most heatedly discussed criticism of the positivists by the natural lawyers is basically the same, that positivism sets no limits upon subjectivism in the law. This complaint of the natural lawyers rose mainly in the aftermath of Nazism. Positivism, because it is beholden to no natural law standard for positive legislation, had no grounds to contest the

2. The Identification of Positivism and Natural Law — For all the sound of controversy between positivists and natural lawyers, positivism is suspect as a muted version of natural law. At least the difference between the two is not nearly so radical as the advocates of each make out.

The scholastics thought of the primary tenet of natural law as the preservation of human life, "the taking of those means whereby the life of man is preserved."[85] The scheme of natural law is the derivation of subsidiary principles from this primary tenet. The immediate circumstances — the fact situation — in which a decision must be made must also be taken into account. Indeed so great an emphasis has been placed upon the calculation of factors and consequences in the particular case that natural law was once characterized as "the law of public expediecy."[86]

While positive law, on the other hand, focuses upon due enactment, and does not articulate a set of primary principles from which law should be derived, it does admit that all legislation is informed by an "ultimate purpose" of human self-preservation.[87] As Professor Stumpf has pointed out, "a principle of validity of a moral nature is already built into" positivism in the basic norm which is presupposed, which is self-validating, upon which the first human legislation is based and from which all positive law is derived.[88]

Now the extraordinary identification of positivism and natural law appears. Not only does positivism rest upon a natural law premise, but the content of that norm is strikingly like the primary tenet of classical natural law: the preservation of human life in society. One wonders how extensive the differences are, too, in a particular case, at least where the natural lawyer is one who acknowledges the importance of existential factors in applying natural law and where the positivist affirms whatever decision is existentially made.

---

validity of Nazi laws. They had been enacted with proper formalities, so, for the positivist, Nazi laws were valid. Here was subjectivism unbridled. Self-interest, imagination, bias, whim, even hallucination, in positivism, could become law, and in the Nazi state did. Positivism is immobilized to oppose such law. But though natural law is not immobilized, it can really only substitute its own subjectivism for the other. But the Gospel is not immobilized either against the subjectivism of positivism or again the subjectivism of natural law.

Incidentally, how proud can the natural lawyers be in condemning positivists on the Nazi law issue, for there is evidence that the Nazis appealed to natural law to validate their legislation? Martin Bormann, Head of the Nazi Party Organization in 1942, wrote. "We National Socialists set before ourselves the aim of living . . . by the light of nature: that is to say, by the law of Life. The more closely we recognize and obey the laws of Nature and of Life, the more we observe them, by so much the more do we express the will of the Almighty."

[85] Thomas Aquinas, *op. cit.*, Quection XCIV, Art. 2.

[86] Vidler, *op. cit.*, p. 15.

[87] Cf. Moeller, "The Problem of Value Judgments as Norms of Law: The Answer of a Positivist," 7 J. L. Ed. 567 (1955).

[88] Samuel Stumpf, "Theology and Jurisprudence," *The Christian Scholar*, September 1957, p. 175.

Now the preservation of human life in society, though it is a tenet of natural law and the basic norm which informs positivism, is *not* a Gospel tenet. In fact, in the Gospel, the preservation of human life in society has the fundamental meaning of death. The Gospel is not about men safeguarding and perpetuating their lives in history, but about the oblation of men's lives to God. *He who finds his life will lose it, and he who loses his life for my sake will find it.*[89] This is not only the final outcome, the manner in which death is overcome, but it is the way in which true life is restored to men in history in the Church. Moreover, Christians know in the Gospel that even the preservation of ruined life in the world is not by the hands of men, not even the legislators, but by the grace of Almighty God. The Gospel is opposed to the imagination of both positivists and natural lawyers. The tension between grace and law is absolute.

3. Jurisprudence and the Problem of Purpose — Even if there is only really a sham battle going on between positivists and natural lawyers, even though the identification of the two may be more significant than the antagonism between them, the controversy has been useful in pointing up the problem of purpose in jurisprudence. Indeed some contemporary legal philosophers suggest that the chief problem of jurisprudence is the fundamental purposive presuppositions in terms of which law is made, rather than the mechanics of legislation. The basic moral distinction, made from alternative purposes, is the decisive issue. The moral decisions made in the legislatures and by courts are ancillary to the initial moral choice underlying the existence of a specific society. Where this view is being developed, great emphasis is placed upon the importance of existential factors in making decisions, that is, the initiating purpose of law does not yield automatic or arbitrary answers to specific cases. On the other hand, in this view law is a matter of prediction, and given the basic purpose of society and a competent grasp of the fact situation, what the law ought to be can be predicted. And only the corruption of the initiating purpose or an inadequate analysis of existential factors will frustrate the fulfillment of that prediction.[90]

This system utilizes insights from both positivism and natural law and it has a regard for the criticisms made of both. Now Christians sometimes join in the discussion of jurisprudence at just this point to declare that the ultimate purpose which should inform positive law is the purpose of the Gospel.[91] Since law is in fact purposive, let the Gospel supply the purpose. "The standard of Christian love, when defined and expressed in its full nature would provide a basis for the more

[89] Matthew 10:39

[90] Prof. Lon Fuller of the Harvard Law School is probably the leading writer developing this viewpoint in contemporary jurisprudence.

[91] Stumpf, *op. cit.*, pp. 189f; this view was also expressed in the Riverside Lectures of 1956 by Prof. Harry Jones of Columbia Law School, and was emphasized in the Ashley Memorial Lecture of 1957 by Dean James A. Pike of the Cathedral of St. John the Divine, New York.

specific ends of law."[92] The Gospel is about the gift of God to men of true life in which they have freedom to love each other, therefore, the initiating purpose of law should be *agape*.[93] "If the essential nature of man is love, which on the collective scale means brotherhood, then love provides a very specific insight into the manner in which society ought to be organized."[94] At the same time, there are limits to how fully positive law can reflect the norm of love, since law is limited by sin.[95]

This has much to commend it because it does not equate the purpose of law with the final hope of salvation. It acknowledges that, as law is limited by sin, law cannot overcome the power of sin. Yet this causes disturbance because grace in fact is sufficient for salvation. If grace is merely a standard of love, partially fulfilled in positive law, but not more than that, then is this standard of love, this normative grace, really grace at all? On the other hand, if grace is somehow more than the standard of love for legislation, and thereby there is hope for salvation beyond the realm of law, what is the character of this other dimension of grace? Is it also in the nature of a norm? If it is, indeed it is not the grace of the Gospel, for the grace of the Gospel is not a norm but His power and judgment and love. And if the "rest of grace" — grace beyond a standard of love for positive law — is not in the nature of a norm, how can grace be only a norm so far as law is concerned? Perhaps what in fact is spoken of as a "standard of love" is really a particular knowledge of good, a concept of good. But if this is how grace is construed, it is manifestly not grace at all.

Moreover, grace construed as the norm of love is set up as what the law ought to approximate. But grace in the Gospel is not an *ought* but an *is*. It is not what should be done by men for God, but what has been done for men by God. Again, the judgment and love of God is alike for all law, and grace does not distinguish — as the "standard of love" must — between this law and that.

This purposive view of law surrenders the truly radical word of the Gospel. By identifying the Gospel with normative love, it overlooks the Gospel opposition to both good laws and bad laws and to all political systems. "When Christian ethics becomes operative in the legal sphere, as it did during the rise of modern liberal democracy, it acts as a fundamental restraint upon power."[96] Now the Gospel is identified specially with modern liberal democracy. "Totalitarian law would thus be thoroughly inconsistent with Christian ethics."[97] But the Gospel supports men's condemnation of totalitarianism. The Gospel may not be so easily identified with the transient legal and political preferences of men. It is quite so that in the Gospel community is restored to men, but the restoration of community, though it is not in

[92] *ibid.*, p. 57.
[93] Prof. Harry Jones characteristically constructs his view around the *agape* concept.
[94] Stumpf, *ibid.*, p. 191.
[95] *ibid.*, p. 193.
[96] *ibid.*, p. 191.
[97] *ibid.*, p. 192.

a totalitarian society, is not modern liberal democracy either. Where community is restored, where men are free to love one another, is in the society which, by God's grace, is constituted in the celebration of the Gospel, that is, the Church in history.

The Obviation of a Christian Jurisprudence

What is before implicit, must now be put directly. The tension between law and grace is such that there is no Christian jurisprudence. There is not a particular philosophy of law which has special integrity in the Gospel. Nor is there a way really to make the positive law or the ethics of law, the purposes of law which men offer as a measure for positive legislation, compatible with the Gospel.

This does not at all mean that Christians disregard the law, rather they regard it for exactly and only what it is: law and justice are the manner in which men maintain themselves in history. Law is a condition of historical existence, a circumstance of the fall. Christians, both in the congregation and in dispersion, are in the world, living in history, under the sanctions of secular law, and this is the locus of their proclamation of the Gospel for the world. For law, the proclamation of the Gospel means, in the first instance, understanding that law, though sometimes it can name sin, itself originates in sin and cannot overcome the power of sin.

This obviates, of course, a Christian jurisprudence, but poses — for Christians and for the world — just what any jurisprudence does not — the tension between grace and law. The Christian sees that the striving of law is for justice but knows that the justice men achieve has no saving power, it does not justify them, for justification of man is alone in Jesus Christ. The grace of God is the only true justice any man may ever receive.

To have no special Christian jurisprudence does not mean that Christians are indifferent, or wholly negativist, toward law. Rather their concern is primarily an issue of vocation, not of jurisprudence.

III. *The Vocation of a Christian Lawyer*

The vocation of the laity is worship. To be a layman in the Church means to be a member of this people gathered by God in history to be His own, and thereby His people bear in the world the message that all men may be reconciled to God. There is no place unto which Christians may not go, no work in which they may not engage, no situation into which they may not enter, for the sake of the Gospel.

> *For I am not ashamed of the gospel: it is the power of God for salvation to everyone who has faith, to the Jew first and also to the Greek.*[98]

For every layman there are limits in his vocation as a Christian. But these are not limits imposed in the Gospel. There are no forbidden occupations in that sense.

[98] Romans 1:16

But the limitations of a layman's own personhood and the circumstantial limitations of the world, of particular history or education or geography or time or caste or nationality, these limitations are effective in the vocation of the laity.

1. Vocational Decision and Evangelism — A layman decides to be a lawyer or not in terms of circumstantial limitations, recognizing that to become a lawyer is to accept a new circumscription. The decision to be a lawyer is made under the vocational claim of the Gospel, but it is not a response, usually, to a special calling to be a lawyer to the exclusion of every other possibility. The real vocational decision is not to be a lawyer, but to be a Christian.

Moreover, because this basic vocational decision to be a Christian is made in conversion, there is really no such thing as preparation for a Christian vocation.[99] Christian vocation is immediate, momentary, never preparatory. True, a law student prepares now to become a lawyer. But his vocation as a Christian is exercised in the place where he already is, wherever that happens to be, it is not suspended until he gets to the place where he wants to be.

The task of the Christian who works in the world as a lawyer, as the task of all other laymen, as the task of the whole Church, is the celebration and the proclamation of the Gospel in his daily work, in order that the world may be evangelized. And in this vocation a lawyer who is a Christian is significantly aided by the realization that there is no peculiar Christian jurisprudence. For the tension between grace and law may then be confronted in its plain terms as an absolute tension, and thereby, really, the evangelistic issue is posed. The inverse is also the case, namely, where grace is thought to be irrelevant, or where grace is contorted as natural law or a mere purposive standard, the evangelistic issue is not posed, or seems to be a matter so remote from law and a lawyer's work as to require no attention.

For lawyers who are Christians, as well as all laymen, integrity in the Christian life means that evangelism takes place, means that evangelization is the product of the celebration of the Gospel and the proclamation of the Gospel.

2. Work and Worship — How, concretely, do Christians worship in their daily work? The whole experience of the Church as the event of the congregation answers. The dispersion of Christians in work in the world does not, after all, change the fundamental reality and relationships of worship.

For the lawyer who is a Christian, his daily work begins to have the dimension and meaning of worship where there is an acknowledgment of God in thanksgiving and of himself as a man in contrition, where there is — in other words — an actual knowledge of the difference between grace and law. The concrete realization — which has the meaning of worship — which the Christian lawyer bears in his work is that the law is not redemptive power.

[99] A common notion among Christians in the university and in military service.

Again, in daily work, the lawyer who is a Christian has the particular freedom of intercession, for his client, for adversary counsel, for witnesses, for colleagues, even, by the grace of God, for the judge. The reality of intercession in daily work does not mean that lawyers should kneel with their clients on the office floor (though it could mean that they do), but the reality of intercession is, of course, the substance of pastoral responsibility and pastoral care.

The Christian lawyer in his work appropriates all that is involved in his work in offering, in oblation to God. He offers himself, all that he is, all that he has, in the moment now given to him, in whatever place he is. This is to say, that only in the vocation of the Gospel is the whole person and his existential situation taken seriously. For oblation is not only the offering of the good work, the work which seems to be creative or competently done or satisfying to the worker or well received of men, but also the work which is not complete, which is not praised, which is not known, which is painful to do. The oblation of the Christian does not have to have its own merit, but it has to be complete.

And Christians, therefore, return from dispersion in work in the world always to the congregation, where worship is characteristic, where worship is the reality in which the Gospel is celebrated and proclaimed. The first responsibility of Christians, lawyers or otherwise, in daily work is participation in the sacramental worship of the congregation. For it is in the congregation that the possibility of the sacramental offering of daily work originates. It is in the event of the congregation that Christians know the Gospel they celebrate, and know how to celebrate the Gospel. It is in the congregation that Christians live in the Gospel and are thereby enabled to celebrate and proclaim the Gospel in their work in the world. The new life for all men, which is begun now in the event of the congregation, is of transforming power, indeed, transforming the work of men, giving to work (in place of the old meaning of death) a new meaning in worship.

> *Christ, our pascal lamb, has been sacrificed. Let us, therefore, celebrate the festival.*[100]

[100] I Corinthians 5:7-8.

The Effect of Religous Principles on Lawyers' Ethical Problems

F. Benjamin MacKinnon

The effect of religious principles upon the attitude of lawyers toward their professional responsibilities shows itself in their treatment of a wide range of ethical problems. To help in appraising this effect, these problems can be arranged in three general, overlapping categories:

1. Problems whose solution, the lawyer believes, is governed by a religious code of conduct based upon divine law or church doctrine.

2. Problems which arise because of the conflict which the lawyer sees between the requirements of divine justice and the requirements of his role in the administration of a man-made system of laws.

3. Problems which arise because of the difference between the character of the professional relationship between lawyer and client and the more intimate relationship between individuals required by his religious principles.

I

One obvious way to examine the effect of religious principles upon lawyers' ethical problems is to investigate the extent to which they provide positive answers to his specific questions. If the lawyer is guided by a detailed religious code of conduct which is relevant to his professional activities, he will, of course, find answers for his ethical problems within his religion.

For example, Roman Catholic canon law and church doctrine may guide the Catholic lawyer in his handling of otherwise troublesome situations. Illustrations of this type of guidance may be found in two series of lectures given to the Catholic Lawyers Guild of Chicago by officers of the Catholic church. One series, entitled *Canon Law on Civil Action in Marriage Problems,* presents a definite pattern of conduct to follow in divorce and separation cases. Many of his worries concerning his own moral responsibility in this troublesome area are solved for him by rules laid down by the church. Similarly, in a series on *The Natural Law and the Legal Profession,* lawyers in the Guild were given assistance, more or less detailed, based

---

Mr. F. Benjamin MacKinnon is currently preparing a report on these questions for the American Bar Association which is re-studying its Canons of Ethics. This is a summary statement prepared for discussion purposes. The author allows us to publish the paper for its usefulness in this discussion, but he has not been able to revise it as he would normally do with a published article.

upon religious principles, for guidance in professional work on such matters as sterilization, housing contracts and leases which forbid children, birth control, alienation of affections, abortion, euthanasia, religious education, bankruptcy, anti-trust suits, the plea of the statute of limitations, wage contracts and strikes, and the responsibility of the buyer to tell the seller of hidden values in the object of the purchase.

Most lawyers, including Catholics, apparently believe that their religious faith provides detailed rules for professional conduct in specific situations infrequently, if at all.

Some lawyers derive assistance in the solution of their ethical problems from religious principles of a different degree of specificity. Many give a religious basis to such guiding principles as "loyalty" and "trust." For example, followers of the Buchmanite movement adopt as guiding principles the four absolutes of honesty, purity, unselfishness, and love[1]. Although the rule of absolute honesty may not solve particular ethical problems entirely, it may assist their solution if it tends to eliminate an element particularly troublesome to lawyers in many situations.

Divine guidance of an even more general sort is relied upon by lawyers to the extent that they give a religious origin to the "conscience" and "moral law" which they call upon in the solution of many of their difficult ethical problems. For example, "He must obey his own conscience and not that of his client."[2] "The client cannot be made the keeper of the lawyer's conscience in professional matters."[3] " . . . he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."[4]

As in the analysis of other principles which motivate lawyers, it is difficult to isolate the particular effect on his actions caused by religious beliefs. However, they probably form a major but unexpressed factor in the decision of many lawyers not to take particular cases, and to stay entirely out of certain fields, for example, divorce practice, criminal practice, and the collection of overdue debts, in which the lawyers might be called upon to face a conflict between professional duties and religious beliefs which they hold concerning usury, certain crimes, and the marriage contract.

A lawyer's faith in a religious standard of conduct may create ethical problems for him, as well as solve them. This is illustrated by the dilemma of a lawyer with a belief in the religious values of marriage who is asked for advice on divorce. Would

---

[1] See Merle H. Miller, "Morality in Tax Planning," 10 NYU Institute on Federal Taxation 1067, 1952.

[2] American Bar Association Canon 15.

[3] ABA Canon 18.

[4] ABA Canon 32.

he take an objective, legalistive view and handle it mechanically like other attorneys, should he act in accordance with his religious beliefs, or should he refer the client to non-lawyer advisers in this field? An another example, should the lawyer who believes that debts should be paid, as a matter of conscience, plead the Statute of Limitations for a client who clearly owes the money? If he refuses to do so, is he being unethical by failing to give the client the benefit of this defense?

II

For most lawyers religious principles apparently do not offer directly applicable standards of conduct; either in terms of solutions for particular problems such as that of divorce, or in terms of absolutely constant rules of behavior such as that of honesty. Like most people in our society they believe that divine law has no direct relevance to our everyday problems; that interpretations of divine law may be relevant to particular problems at particular times but have no lasting application. For lawyers in this group, religious principles serve in a more indirect way as an aid to the solution of their ethical problems, and as a source of these problems.

A common analysis of the relation between religious principles and the practice of law develops along the following lines:[5] If divine justice cannot be obtained by the direct application of revealed divine law, it must be approached through some man-made system of dispensing justice. Because of man's innate imperfections he cannot act in a way consistent with the requirements of divine justice. In order to approach this perfection he seeks justice by setting up a legal system adapted to the requirements of this imperfect world.

By the very nature of such an institution, our legal system approaches the problem of justice on an impersonal basis. "Law of necessity generalizes, it embraces in one rule a multiplicity of cases. There can be no such thing as a law which discriminates the individual, which is entirely fitted to the individual, which would admit as valid the uniqueness of the individual, for that would invalidate the very conception of law."[6] Also, the legal system is unable to dispense perfect justice because it treats all as bound by rules laid down in advance, following the principle of the value of predictability.

Because individuals differ essentially one from another and because their acts form patterns which do not conform to predictions, these inherent fallibilities in our legal system preclude perfect justice. Also, there is the further addition of the injustices due to the imperfect character of our lawmakers — executives, legislators and judges.

The implication of this argument for the lawyer is that he is participating in a legal system which is designed to approach justice in all cases as nearly as possible,

[5] "Justice" unless otherwise qualified will be used to mean divine justice; "law" to mean our man-made system of laws.

[6] H. Emil Brunner, *Justice in the Social Order*, New York, Harpers, 1945.

but that the ideal will never be attained because of imperfections in man and the system which he has created. Although the system is the best hope for the generality of cases, the lawyer must be aware that in particular instances it will yield injustice for the individual.

In addition to the character of the legal system itself, the lawyer is concerned with the requirements of his particular role in that system. If the lawyer were in a position of complete authority in the system he might believe it possible to interrupt its operation so as to achieve justice in the unusual cases — "to play God." However, he recognizes that he does not have that power, and that such power in his or anyone's hands would be undesirable. The lawyer's traditional role in the legal system is a specialized one which excludes him from any possibility of control over the system itself.

In the adversary system the function of the lawyer is to present, as an advocate, his client's case in the most forceful manner possible, within certain limits, so that the full value of the client's position can be appreciated by the deciding tribunal — the judge and the jury. The opposing advocate will call attention to the weaknesses in his case and the arguments for the other side. The decision of the tribunal will be based upon these conflicting efforts. This system has been worked out over the centuries and seems to be the one most likely to approach justice in most cases. However in order for it to function, the lawyer must play a specialized role which does not permit him to pass upon the justice of the case. The lawyer participating in a dispute cannot, himself, see to it that justice is done.

This institutionalized role of the lawyer removes him two steps from justice. In the first place, he realizes that he must seek to achieve justice within the existing legal system. In the second place, he realizes that in order to make the system function properly in general he must confine himself to the role of the advocate. It would be inconsistent with his role and would destroy the merits of the system if he were to take it upon himself to point out his client's faults, or to say himself what the legally just result should be. In addition, he must keep in mind that his arguments must be limited to those which are legally relevant and admissible in court, although, under this limitation, he may believe he cannot "do justice" to the true merits of his client's cause.

It is in connection with these aspects of the lawyer's function that Mr. Curtis has described the role of the advocate as being more closely akin to the Stoic philosophy than the Christian philosophy. In discussing the detachment which the lawyer must have in order to give the client good legal advice he states. "There is authority for such detachment. It is not Christian. Nor is the practice of law a characteristically Christian pursuit. The practice of law is vicarious, not altruistic, and the lawyer must go back of Christianity to Stoicism to the vicarious detachment which will permit him to serve his client."[7]

[7] Curtis, "The Ethics of Advocacy," in *It's Your Law*, p. 32.

To the extent that they must develop an unchristian detachment, their role must worry Christian lawyers. However, many lawyers believe that the performance of their limited role is more likely to contribute to divine justice in our complex modern society than any attempt on their own part to assess the true worth of their client's case, and, therefore, that their role is compatible with Christian philosophy.

Curtis quotes a passage from Lecky's *The Map of Life,* which defines the problem for the advocate: "at best there must be many things in the profession from which a very sensitive conscience would recoil, and things must be said and done which can hardly be justified except on the ground that the existence of this profession and the prescribed methods of its action are in the long run indispensible to the honest administration of justice."[8]

Apparently some men are unable to accept this reconciliation of the advocate's role and religious teaching. For that reason they leave the study and practice of law because they believe it to be an occupation which is incompatible with their religious principles. Other lawyers who worry about the moral implications of the advocate's function solve their problem by restricting themselves to fields of practice in the law, such as estates and trusts, where they are rarely involved in litigation or other disputes of an adversary nature.

Within the bounds of the advocate's role in the system there remains considerable latitude for him in the manner of the performance of his official duties. The advocate has the great power of being able to present his client's case as he sees fit. The proper performance of the role depends to a great extent upon the lawyer's own self restraint. If he does not feel bound by certain moral standards to confine himself to the proper exercise of his role, the legal system will not work. The lawyer himself cannot see that justice is done but the legal system which attempts to achieve justice depends completely upon his proper performance of his role. In this sense there is a direct relationship between the advocate's moral code and divine justice.

Similar problems concerning the manner in which he presents his client's case arise when a lawyer participates in proceedings which resemble trials but vary in important ways from a formal adversary proceeding in court. Examples of such proceedings are: commercial and labor arbitration, collective bargaining, contract negotiation, consultation and negotiation with the Treasury Department, and participation in the many formal and informal proceedings before administrative agencies.

In these proceedings some of the elements of the true adversary system may be lacking. There may be no impartial tribunal. There may be no opponent charged with the task of direct opposition to your case. Because of these differences, the demands on the lawyer's self restraint, in the interest of justice, may be great.

[8] *op. cit.*, p. 20.

Frequently, lawyers call upon religious faith to help them maintain their precarious balance in this situation between the contending demands of loyalty to the client, obligation to the law as an "officer of the court," and the responsibility of maintaining a professional independence from both client and court.

So far we have been discussing the role and problems of the lawyer as an advocate in an adversary system. If we look at modern lawyers' activities as a whole we can see that most of their work as a group (and as individuals, probably) is done outside of the courtroom and therefore not within the direct, immediate framework of the adversary system. The "office lawyer" — the prototype of the modern American lawyer — who gives legal advice concerning a proposed business transaction or to an individual about his personal plans is, of course, concerned with the adversary system because he realizes that his advice may be put to the test of a trial. However, he knows that the great majority of his arrangements will probably never be put to this test. He is an adviser not an advocate.

What role does an "office lawyer," seeking to apply his religious principles to his occupation, assign himself? What is the relation between divine justice, the legal system, and his job?

As "ministers of the law" some lawyers believe that their best efforts should be directed toward advising clients concerning "what the law is." They believe the lawyer should not try to guide the client in accordance with what he thinks the law ought to be. "Lawyers are not the keepers of the Congressional conscience." If laws are to be changed, the changes should come from the legislature, not from lawyers' advice to private clients, they believe.

This problem of the adviser's role in relation to the law is particularly acute in the field of taxation. There it is talked of, unhelpfully, in terms of evasion and avoidance. Most tax lawyers say that it is their duty to take advantage of any imperfections in the tax law which favor their clients. Others condemn them on moral grounds for this attitude. A minority, some explictly because of religious principles, view it as the tax lawyers' function to raise the standards of tax morality, not only of their own clients, but also of the whole society, by their advice to clients.

Summary. The difference in attitude toward the lawyer's roles reflects differences in opinion concerning the lawyer's duty to respect a higher law than that of the existing legal system, and, further, differences concerning the means of enacting and enforcing this "higher law." These differences are probably frequently based upon the lawyer's views concerning the existence of divine justice, the relation between that justice and the legal system, and the relation between the individual lawyer and both justice and the legal system. Both the existence of a religious faith and the nature of that faith would affect the character of those views.

III

Apart from their influence on his relationship to the legal system, the lawyer's religious principles also affect his relations with his clients. Although he finds no specific code to rely on in his attempts to solve his client's problems, he may draw from his religion an attitude or approach to the problems. This attitude usually consists in the attempt to view the legal matter as one aspect of the total problem of the personality or personalities who are involved in the transaction.

If a transaction is tested for its legal validity, the lawyers will have to follow the pattern required of him by our legal system. However, in the absence of such a testing, he may feel that he is not limited to the purely legal aspects of the problem nor to the role of the advocate before a tribunal.

For example, he should, perhaps, make an attempt to handle the client in terms of the whole man rather than in terms of his legal problems. In this way he would be coming closer to a religious ideal of putting his relationship with his fellow man on a basis of love and mercy rather than justice or, particularly, legality. Of course, the lawyer might not be competent to advise on the non-legal aspects of the problem but this attitude would make him give thought to the total situation.

The traditionally intimate lawyer-client relationship is a good vehicle for this religious attitude. To the extent that the lawer-client relationship has been weakened by modern developments in the profession such as specialization with its consequent fragmentation of the client's problems, and the development of large firms in which the client's problems are spread about among many individuals, the lawyer's opportunity to deal with the whole problem is proportionately limited.

This attitude, that religious principles require the lawyer to make the most of his relationship with his client, to be able to act with love and mercy towards his entire problem, is opposed to many of the traditional standards of the profession.

These hold that the ability of the lawyer to give disinterested, and therefore good, legal advice requires an aloof detachment from the client. Involvement with clients, financial and personal, may mean the loss of the distinguishing character of the professional man, his independence. Finally, his role in the administration of justice requires that the advocate be kept separate from his client. He argues for him but he is not identified with him. It is an impersonal role. That is why barristers are kept apart from their clients and, perhaps why they wear wigs and gowns.

Summary. The lawyer-client relationship provides an opportunity for the intimate relationship in which religious principles can best be acted upon. But taking advantage of this opportunity may destroy the lawyer's usefulness to the legal system and be harmful to the client's purely "legal" affairs. The trends of the profession toward specialization and combination reduce the intimacy of the lawyer-client relation and emphasize the lawyer's concern with the legal aspects of his client's problem.

Books and Publications

The Fountain of Justice: A Study in the Natural Law

By John C. H. Wu. New York, Sheed and Ward, 1955.
ix, 287 pages. $3.75.

(*The following review is composed of selected paragraphs from a more extensive treatment by the reviewer in the* Northwestern University Law Review, *Vol.* 51, *No.* 6, 1957. *It is reprinted by special permission.*)

This book comes at a good time. One of the facets of the "religious revival" which — however it is to be evaluated — is an evident fact on the American scene is a new look at the foundations of all disciplines in the light of the Judaeo-Christian tradition. Jurisprudence is no exception.

The author, Professor of Law at Seton Hall University, is openly wedded not only to a religious point of view but to the scholastic philosophy of St. Thomas Aquinas. Yet his pragmatism is still there.

It turns out that the immutable are things which nobody — in his right mind — can deny; and as to all else, he quotes Bracton with approval: "It is not an unsalutary thing to be doubtful about contingent things . . ." and St. Thomas: "Laws are laid down for human acts dealing with singular and contingent matters which have infinite variations. To make a rule to fit every case is impossible." And the author avers: "For the most part, the judge must use inductive logic, a logic of probabilities and balance shading off imperceptibly into realms of art and ethics."

What are some of these *immutabilia?* One is the Confucian (and negative, hence juridically possible) version of the Golden Rule: do not do unto others what you would not have them do unto you — expressed in the civil law maxim: *sic utere tuo ut alienum non laedas.* Another is the principle that a man should not profit from his own wrong. Another is that people are more important than property. And: "It is wrong to slay the innocent, to sell justice, to give a judgment without examination of the facts . . ." The author can cite universal support for such notions. But for certain other elements of the natural law we need revelation, since the intellect is darkened by sin. From the Old Testament he derives, for example, monogamy (the reviewer has not found the Old Testament unequivocal on the point!) and from the New Testament, for example, the doctrine of *mens rea* (St. Mark 7:18, 21-23), the positive form of the Golden Rule, the evil of tyranny (Matthew 20:25-28), and the right of religious freedom.

But as to the lack of coincidence between natural law, as he illustrates it, and positive law of any given period, the author has an explanation, and one that involves him in an evolutionary concept: the courts are aware of their own limits and have to take account of "the frailties of human nature and the actual state of civilization . . ." Thus there is a paradox throughout the work: when he can cite a judge acting explicitly in accord with a "natural law" principle, that helps prove the

natural law; but when he draws a blank, he is able to say — like the child explaining an empty page to a teacher who had asked for a picture of the Flight into Egypt — "they haven't quite arrived yet."

But this is a paradox that cannot be avoided in any approach which maintains the tension between the normative and the descriptive, the "ought" and the "is." The most positivist jurisprudent was always prepared to argue "oughts" in court, particularly in issues involving social progress. What our author does is to articulate the genuine cultural source of our generally accepted "oughts."

The basic question is of course whether our norms and ideals are generalizations based on our best experience or are pre-ordained patterns to which — in greater or lesser measure — we conform. Maybe it is not either/or but both/and. For some of us — in ethics no less than law — the two great commandments are in the latter category, almost everything else is in the former.

All such qualifications aside, Dr. Wu is indubitably right in his grounding of the common law, in England and as received in the United States, in the ethics of the Judaeo-Christian faith. Whatever the reader's philosophical or religious position, he will profit from the author's historical survey of the relationship of Western religious thought to the common law in which he presents not only the words of the familiar figures in the history of jurisprudence, but also quotations from a wide variety of court opinions — little known and well known. Here and there one is tempted to think that the judicial result was reached on a basis of "common sense", then embroidered with a biblical text or pious phrase — and the author exposes none of the instances where the Bible (like the American flag) has been dragged in to buttress a bad conclusion. But Dr. Wu sufficiently makes the point: Judaeo-Christian thought has significantly influenced our system of law — and for good.

Nowhere does the author's spirit better manifest itself than in his closing chapter on "The Art of Law." Here he introduces themes which lay the foundation for personal reflection on the relation of law to the life of the lawyer. The reviewer wishes that the author had developed these themes more fully, specially that of the religious vocation and ministry of the attorney. Here we are involved in the deepest religious and ethical concerns: purity of heart, independence of spirit, the ethics of decision-making, the ambiguities of actual life-situations, the vector-analysis of pressures.

After thousands of years of jurisprudence this is still a frontier of thought. Lawyers, teachers and students will be better prepared to face such questions in the light of their religious perspective if they read books like *Fountain of Justice.*

James A. Pike

Religion, Morality, and Law

Studies in Jurisprudence III.

Edited by Arthur L. Harding. Dallas, Southern Methodist University Press, 1956. xi, 109 pages. $3.00. (Contributors: Robert E. Fitch, Arthur L. Harding, Wilber G. Katz, and Joseph D. Quillian, Jr.)

If religion is necessary to morality, and if morality is necessary to law, then religion is necessary to law. The third annual conference at Southern Methodist University on Law in Society was addressed to the question, "Is some sort of religious doctrine essential to law?" Curiously, however, an affirmative conclusion was reached only by indirection, in the manner of the above "if . . . then" structure.

Perhaps this is explained by what provoked and provided a framework for the conference — the dictum of Sir Alfred Denning, Lord Justice of the English Court of Appeal: "Without religion there can be no morality: and without morality there can be no law."

The first stage of this statement is discussed in the first paper; the second stage in the next.The third paper examines relationships between Christian morality and criminal punishment, while the fourth presents a theological analysis of natural law. One would expect a paper devoted to what might be called the third stage of the proposition, concerning relationships between doctrines of religion and theories of law. But instead, the introduction merely states: "Historically the most obvious connection between religious and legal doctrines may be found in the varying concepts of the Natural Law . . ." Mr. Harding then laments that natural law doctrines have been out of favor, and suggests that one of the claimed grounds for rejection of natural law reasoning is its supposed incompatibility with Protestant theology. The fourth paper, by Mr. Quillian, Professor of Homiletics at Southern Methodist University, is an affirmation of compatibility, or, put negatively, an attempted rebuttal of this ground of attack on natural law. Charity constrains me merely to observe that this paper seems to me to have done little more than muddy the waters of the dispute.

Thus the announced ambitious scope of the conference is not fulfilled by the papers, and, with the narrowing, the ultimate question goes begging. That is, of course, the essentiality of religion to law, with concomitant questions of choices among conflicting doctrines of theology and theories of jurisprudence. This significant omission, taken together with earlier titles in these studies in jurisprudence, (*Origins of the Natural Law Tradition*, 1954; *Natural Law and Natural Rights*, 1955) indicates a disappointing failure in focus.

It is true that Mr. Harding's paper on "Can There Be Law Without Morality?" does give cursory treatment to conflicting theories of law. The one extreme is natural law, the other the analytical jurisprudence of John Austin. A sociological

concept of law, lying between these poles, is suggested. After coming to the "rather startling conclusion that morality is an effective and operating part of the legal institution," Mr. Harding, who is Professor of Law at Southern Methodist University, charts the "tasks ahead" as he sees them.

First, there is the philosophical task of seeking a measure or standard of "good" or "right" morals, which appears to this reviewer to be nothing less than a demand for a theory of ethics. Next, since morality includes relative ideas of social good, we must identify what is "good" in a society. Pound has blazed a trail through his theory of Social Interests and neo-Hegelian civilization concept, but his "inability to divorce these things completely from absolutist ethical standards, despite his valiant efforts to do so, would indicate that the ultimate solution to problems of social morality will turn upon the first solution of ethical 'right'." Lastly, we "have a job of education." The American Bench and Bar must be weaned away from Austinian declarations of freedom from legal philosophy, and urged "to seek and to recapture the means of perceiving greater right and justice in law, and through it a greater civilization to a weary people."

It must be said that such a blueprint suffers deeply from its evasive vagueness. Greater particularity and more specific content are required to arouse the legal profession to embrace legal philosophy.

The initial question, "Can There Be Morality Without Religion?" receives a generally negative answer from Mr. Fitch, Dean of the Pacific School of Religion. The core of his argument rests on an analysis of ethical values. Of the five principal values — pleasure, power, duty, wisdom and love — only pleasure and power have been wholly and consistently found in a secular ethic. Ethics based on these values have failed to survive historically. Since Mr. Fitch begins with an admission of concern for "good" morals, his remaining argument is persuasive that morality (i.e., "good" and successful morality, based on values of duty, wisdom, or love) is found always in a religious context; at least it is persuasive to a nonhumanist reader.

Valuable insights are given us by Mr. Katz, Professor of Law at the University of Chicago, in his paper relating classical Protestantism to the purposes of the criminal law. His analysis is illuminated by the light of modern dynamic psychology. Perhaps most interesting is the treatment of the social demand for punishment. There is a religious justification for punishment, not only in spite of, but quite aside from, candid recognition of the extent to which human conduct is determined antecedently.

Vicarious responsibility, dramatized by the character of Harry in T. S. Eliot's *Family Reunion,* is examined with sympathy and penetration. The vital link between forgiveness and repentence (rehabilitation, in secular terms) is laid bare with incisive understanding.

The essential tragedy of the law is that, while it is indispensable to repentance or rehabilitation, this end cannot be accomplished by the law alone. Indeed, the law

may often impede such accomplishment. For repentance beyond despair. God's loving acceptance is needed. Christ's proper work of redemptive love is required for fulfillment of the law's purposes. Continuing atonement may be participated in by offenders, who should accept full responsibility for their acts, and also by their fellow citizens, who should extend a forgiveness which may well be costly. This essay should be read and pondered by anyone interested in Christian theoretical bases of an enlightened rehabilitative penal system.

Again, it is regrettable that no paper was devoted to the question whether religion is essential to law. Nevertheless, a thoughtful and provocative book has been added to the literature which nourishes an increased interest in what has been termed "interdisciplinary study."

William J. Hempel

The Moral Decision

By Edmond N. Cahn. Bloomington, Indiana University Press, 1955. 342 pages. $5.00.

Professor Edmond Cahn of New York University's law faculty offers in his book, *The Moral Decision,* views from which may issue a useful dialogue between Christians and non-Christians in the legal profession.

Professor Cahn's attempt is to articulate a decisional ethics which, while rejecting both legal positivism and natural law, looks specifically to American law to furnish moral guides for making explicit decisions. In concentrating, therefore, upon the concrete situation in which a decision must be made, he does not merely equate morals with mores; but neither does he put stock in "immutable principles" which the actual making of decisions subject to endless mutations and tenuous deductions. Instead he propounds a dynamic, provisional, yet basically anticipatory and advancing conception of moral decision. In the material of the immediate case before a court — in the context of the peculiar situation confronting a man — men as judges or simply as human beings have a capacity to discern moral standards for their decisions "superior to those their fathers evolved."

Now at first blush this is an attractive notion; it does not simply look backward, yet it rests upon the moral decisions which have gone before; it does not behold only the present, yet it takes the timely practical risks seriously; it looks to the future and promises — not a moral universe, nor paradise — but a human life more moral than ever before, yet not as moral as that which will ensue.

Albeit attractive, this is a blasphemous doctrine. And if morality ultimately has anything to do with God Almighty, it is an immoral doctrine. For the only

affirmation Professor Cahn is really making is an affirmation of man as one who is justified by his own decisions founded in his own knowledge of good and evil. Professor Cahn is simply affirming Adam (Genesis 3:5).

Yet here is the very respect in which non-Christians and Christians differ: non-Christians affirm Adam; Christians affirm the "new Adam," that is to say, Jesus Christ. *The Moral Decision* illustrates how significant is the difference between these two affirmations. To affirm Adam is to conceive of life as making decisions between right and wrong. To affirm Christ is to know that men live in sin — in all the decisions they make — and yet are sustained by grace. To affirm Adam is to find justification for men in their "moral decisions." To affirm Christ is to receive God's gift of Himself as justification for men and to discern that in itself the affirmation of Jesus Christ is the truly moral decision.

Professor Cahn does not hold out his views as Christian. While it may be distressing that this reasonable man is so absorbed in the problem of right and wrong that he does not perceive either the power of sin or the reality of grace, it is not surprising. What is far more distressing and surprising is the similarity of Professor Cahn's views with the prevalent and appealing middle axiom ethics of many Christians.

For there are Christians who, if they entered a dialogue with Professor Cahn, would be engaging, not in an evangelistic encounter — the only purposive dialogue in which Christians can engage — but in a discussion of comparative decisional ethics. I am not saying, here, that Christians do not need some decisional ethics. But I do suggest that Christians become so fascinated by making immediate "moral decisions" and so preoccupied with formulating middle axioms in terms of which decisions may be made, that the decisions, whatever else their effect, carry very little evangelistic relevance.

Secular folk may be attentive and attracted to Christian middle axioms because they can understand them simply in terms of right and wrong without ever confronting the dimension of sin and grace. This way of discussing moral problems or of relating to contemporary culture or of communicating with secular people is being propounded by some Christians nowadays in order to witness to the world. The irony of this is in thinking that, by not speaking about Jesus Christ, we communicate the Gospel.

William Stringfellow

A BIBLIOGRAPHY ON CHRISTIAN FAITH AND THE LAW

Articles

Adler, M. J., "A Question of Law," in *Essays in Thomism,* ed. by Robert E. Brennan. New York, Sheed and Ward, 1942

"The Church and International Law," Report of a Bossey Conference, 1950, *The Ecumenical Review,* 3:1, October 1950, pp. 64-76.

Harpster, J. F., "Christian Advocacy," *Marquette Law Review,* 35:413, 1952.

Katz, Wilbur G., *Natural Law and Human Nature,* Episcopal Faculty Paper. New York, National Council of the Episcopal Church, 1955.

Katz, Wilbur G., *Moral Theology and the Criminal Law,* Episcopal Faculty Paper. New York, National Council of the Episcopal Church, 1956.

"Law and Theology," *Law Notes,* 17:65, 1913.

Lobingier, C. S., "Common Roots of Law and Religion," *Temple Law Quarterly,* 19:390, 1946.

Lundberg, F., "The Legal Profession," *Harpers Magazine,* December 1938, pp. 1-14.

Lundberg, F., "The Priesthood of the Law," *Harpers Magazine,* April 1939, pp. 515-526.

McNeill, John, "Natural Law in the Thought of the Reformer," *Journal of Religion,* 26:3, 1946, pp. 168f.

Miner, J. H., "Religion and Law," *Chicago-Kent Law Review,* 21:156, 1943.

"The Natural Law and the Legal Profession," Catholic Lawyers Guild of Chicago, 1950.

Stringfellow, William, *The Life of Worship and the Legal Profession,* Episcopal Faculty Paper. New York, National Council of the Episcopal Church, 1956.

Wilder, Amos, "Equivalents of Natural Law in the Teaching of Jesus," *Journal of Religion,* 26:2, 1946, pp. 125f.

Williams, Daniel Day, "Ethical Foundations of the Law: A New Interpretation," *Christianity and Crisis,* 17:13, July 22, 1957, pp. 99-101.

Wu, J. C. H., "Toward a Christian Philosophy of Law," *Women Lawyer's Journal,* 37:34, 1951.

Books

Barth, Karl, *Church and State. London,* SCM Press, 1939.

Bennett, John, *Christian Ethics and Social Policy.* New York, Charles Scribner's Sons, 1946.

Berdyaev, Nicolas, *The Destiny of Man.* New York, Charles Scribner's Sons, 1937. (Esp. Part II, Chapters 1-3)

Brunner, Emil, *The Divine Imperative.* London, Lutterworth Press, 1937. (Esp. Chapters 28, 36, 37)

Farrell, E. P. *The Theology of Religious Vocation,* St. Louis, Herder, 1951.

Jones, Harry, *Legal Realism and Natural Law: A Protestant Interpretation,* Riverside Lectures at Riverside Church, New York City, 1956. (Not published)

Moberly, Sir Walter H., *Responsibility,* Riddle Memorial Lectures at the University of Durham, 1951. New York, Oxford University Press, 1951.

Niebuhr, Reinhold, *The Nature and Destiny of Man.* New York, Charles Scribner's Sons, 1943. (Esp. Vol. I, Chapter 9)

O'Sullivan, R., *Christian Philosophy in the Common Law.* Oxford, Blackfriars, 1947.

Passerin d'Entreves, A. P., *Natural Law: An Introduction to Legal Philosophy.* New York, Hutchinson's University Library, 1951.

Pike, James A., *et al, The Ethics Beyond Legal Ethics,* Ashley Lectures in Law and Theology at New York University School of Law, 1957. (Not published)

Pound, Roscoe, *Law and Religion,* Rodwell Lectures at Rice Institute, 1940. Rice Institute Papers. (Not published)

Rommen, H. S., *The Natural Law.* St. Louis, Herder, 1947.

Schrey, H. H., *et al, The Biblical Doctrine of Justice and Law.* London, SCM Press, 1955.

Tillich, Paul, *Love, Power, and Justice.* New York, Oxford University Press, 1954.

Vidler, A., *et al, Natural Law, A Christian Reconsideration.* London, SCM Press, 1946.

CONTRIBUTORS TO THE BOOKS AND PUBLICATIONS SECTION

The Very Reverend James A. Pike is Dean of the Cathedral of St. John the Divine, New York City, and Adjunct Professor of Religion and Law, Columbia University. He has published several books including *Beyond Anxiety* and *Doing the Truth.*

Mr. William J. Hempel is a Root-Tilden Scholar at the New York University School of Law and Associate Editor of the New York University Law Review.

Mr. William Stringfellow, Parish Counsel of the East Harlem Protestant Parish, New York City, is author of "The Lawyer as Churchman" in this issue of *The Christian Scholar* and prepared the "Bibliography on Christian Faith and the Law."

Reports and Notices

The Danforth Teacher Study Grant Program

Among those organizations supporting the ever growing search to discover those relationships existing between scholarship in the academic disciplines and Christian values is The Danforth Foundation of St. Louis, Missouri. It confines its activities very largely to the area of higher education with special attention to the recruiting and training of competent teachers in all fields.

One of the major problems facing many teachers in our colleges and universities is that of finding the financial means for completing their doctoral degrees. Since 1954, 169 teachers have found the solution to this through the Danforth Teacher Study Grant Program. This program was formulated with the intention of raising the quality of teaching in our institutions of higher learning. From fifty to seventy grants are made each year to men and women, without bar of race or color, who give promise of becoming college teachers of unusual strength and competence and are prepared to engage upon a twelve-month program of graduate study.

Each year The Danforth Foundation invites all accredited colleges within the U. S. A. to nominate one or more teachers for these Study Grants. To be eligible, a teacher must be between the ages of 25 and 40, have had at least one year of successful graduate study, and three years of teaching experience (two of which must have been on the college level). Those receiving the grants are chosen on the basis of potential excellence as teachers, outstanding academic ability, personality congenial to the classroom, and integrity and character, including serious inquiry within the Judaeo-Christian tradition. Applicants with deep rootage in some non-Christian faith, and willing to participate actively in a predominantly Christian program, are given equal consideration. Nomination from the Dean of each institution must be received prior to October 15.

These appointments will allow the teacher one-half his salary for the academic year plus one-sixth of his salary for each dependent up to a total of his full salary, not exceeding $4,600. The minimum grant is $2100. In addition, the Danforth Teacher is given tuition and official fees at the graduate school of his choice.

All major disciplines are well represented among the appointees, with the highest percentage of applications coming from the fields of English, Music, Art, Sociology, History, and Speech. Forty-nine different graduate schools have been chosen by the teachers for degree work.

The Foundation believes that the Christian teacher must not only be a person of significant commitment but one of scholarly competence as well. Otherwise, he will be unable to awaken his students to that "vision of greatness" which Whitehead claimed to be essential to true education. By offering financial assistance and a relationship of encouragement in a framework that is frankly Christian in spiritual intent. The Danforth Foundation hopes that this program of Danforth Study Grants will be a significant part of its total effort to strengthen American higher education.

Pressley C. Mc Coy
Assistant Director, The Danforth Foundation